PÉTER KOVÁCS ||| THE JURISPRUDENTIAL PRACTICE OF THE INTERNATIONAL CRIMINAL COURT

# PÉTER KOVÁCS

## THE JURISPRUDENTIAL PRACTICE OF THE INTERNATIONAL CRIMINAL COURT – AS I SAW IT

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# Foreword

**THE END OF MY MANDATE** (2015–2024) at the International Criminal Court approaching, I had the idea to gather some of my articles written about different aspects of the jurisprudence of the International Criminal Court in one volume. I was delighted that the initiative was warmly received by the Central European Academy (Budapest).
At the moment of the republishing, only a few actualizations had to be done, e.g. when dealing with the actual number of States Parties, already 124 with Armenia's entry in 2024.

The director of the publishing, professor Ede János Szilágyi, convinced me that I should add some new chapters to the compilation in order to cover even more topics. He and his team worked a lot for the realization of the book. I am very grateful to them and especially to Beáta Szabóné Kovács for her valuable work during the finalization of the book.

I have to express my thanks to the Hungarian and foreign colleagues who, in their editorial capacity, consented to the re-editing of my articles first published in their books. Their name and their work will be appended at the beginning of the respective chapters.

Even if my articles were written by me, I have to emphasize the contribution of legal officers, visiting professionals and interns. My work is based on a multitude of high quality orders, decisions, judgments, internal and outreach documents prepared by a very professional legal staff tirelessly working at the International Criminal Court.

Finally, I have to emphasize that the chapters were written in my personal capacity as a professor of international law at the Péter Pázmány Catholic University of Budapest and the thoughts expressed in the book cannot be attributed to the International Criminal Court.

The Hague, March 1, 2024

# CHAPTER I

# The International Criminal Court in the context of International Criminal Law[1]

## 1. FROM EARLY THOUGHTS, PROMISES TO THE REALIZATION: THE LONG WAY OF THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

### 1.1. Historical antecedents

While war, cruelties and atrocities are interrelated in the history of mankind, only a few historical examples can be found of genuine, concerted international action to set up at least *ad hoc* mechanisms to investigate war crimes and if possible, to punish their perpetrators. The best-known historical example is Peter von Hagenbach's condemnation and execution in 1474 for crimes committed during his rule in Breisach as bailiff instated by Charles the Bold, Duke of Burgundy.

The Imperial War Council of emperor Leopold von Habsburg had to open an investigation in order to clarify why some commandants and officers of the troops of the Holy League had engaged in a massacre of the Jewish population as well as Turkish children, women and surrendered soldiers when liberating Buda from the Ottoman yoke in 1686. Moreover, a good number of Jewish survivors were kept as slaves of the Christian officers who engaged in a slave trade or ransom

1 This chapter was published originally in: Raisz, A. (ed.) (2022) *International Law from a Central European Perspective.* Budapest – Miskolc: CEA Publishing. (Legal Studies on Central Europe, ISSN 2786-359X), pp. 181-217. https://doi.org/10.54171/2022.ar.ilfcec_9
I thank Anikó Raisz for her consent to the republishing.

business until the well-off Oppenheim, supplier of the army and the emperor's creditor arranged their freedom and as a counterpart, reduced the huge imperial debt.

Nor were the following two centuries void of actions which can be considered today as a war crime. See e.g.: *i.* Napoléon's order to massacre his Arab and Albanian prisoners of war at Jaffa[2] during the Egyptian campagne; *ii.* the execution of surrendered Hungarian generals by Julius von Haynau[3] after the defeat of the Hungarian independence war of 1848/1849; *iii.* the Battack massacre by Ottomans in the uprising Bulgarian territories[4]; *iv.* the attacks against native American women and children on the Wild West[5]; *v.* the establishment of British concentration camps during the Boer wars[6], etc.

Even if the second half of the 19th century saw the birth of the what we can rightfully call international humanitarian law in the form of several multilateral conventions (see e.g. the Saint-Petersburg declaration[7], the Geneva Convention[8] and The Hague Conventions[9]), which was followed by similar or complementary treaty-making at the beginning of the 20th century[10], World War One broke out and

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2 Siege of Jaffa.
3 The 13 Martyrs of Arad.
4 Batak massacre.
5 Wounded Knee Massacre.
6 Second Boer War concentration camps.
7 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868.
8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1866; Additional Articles relating to the Condition of the Wounded in War, 1868.
9 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1899; Declaration (IV,2) concerning Asphyxiating Gases, 1899; Declaration (IV,3) concerning Expanding Bullets, 1899.
10 Convention on Hospital Ships, 1904; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906; Convention (III) relative to the Opening of Hostilities, 1907; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities,

ended four years later in a context where rules of warfare could be considered as well known but no previously established international sanctioning mechanism existed to give them effect. Although the observation of elementary rules of humanitarian law can be considered as rather satisfactory in 1914-1918 (which is certainly true if we take into account their observation during World War Two), this does not mean that outrageous crimes did not occur, committed equally by soldiers of the Central Powers and soldiers of the Entente cordiale. (It is to be noted that there was an important legal weakness hidden in a good number of the above conventions, i.e., the so called *„clausula si omnes"*, liberating the contracting parties from their obligations if at least one of the enemy belligerents was not bound by the given convention.)

However, the peacemakers of the so-called Versailles peace treaties intended to establish only one international tribunal having jurisdictional competence over a single, emblematic person, the German Emperor William II. As we know, this international tribunal never came into being because The Netherlands granted asylum to the abdicated emperor and refused to surrender him.

A German tribunal, established and working in Leipzig was mandated by the Allied and Associated Powers to probe German officers charged with war crimes and this institution delivered a handful of judgments, some of which pronounced imprisonments.[11] Concerning other alleged war criminals of the former Central Powers, no penal procedure was engaged and e.g. the genocide committed against Armenians living in the Ottoman Empire[12] was left without genuine persecution even if three persons were allegedly executed among the

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1907; Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, 1907; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 1907; Convention (IX) concerning Bombardment by Naval Forces in Time of War, 1907; Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, 1907; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 1907; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 1907.

11 Leipzig Trials.

12 Armenian Genocide.

eighteen sentenced to death during the period between the Sèvres and the Lausanne peace treaties.

It is also to be emphasized that war crimes committed by the armies of the victorious Entente Cordiale were at once forgotten and left without consequences. This went parallel to the lack of trial concerning the military use of poisonous and asphyxiating gases, a warfare used on both sides of the frontline...

The post WW I law-making tried to reflect on the shortcomings of the previous The Hague and Geneva Conventions as observed in the war. The adopted humanitarian law conventions dealt *inter alia* with the protection of the wounded and the sick[13] and that of prisoners of war[14], the prohibition of gas weapons[15] etc. without touching upon, however, the *si omnes* rule or the status of resistants, not belonging to the regular armies.

Interlinked with the political climate created by Yugoslav King Alexander's murder perpetrated in 1934 in Marseille by extremists of the VMRO and Oustashi movements[16], where politicians and media suspected the involvement of governments of several countries, the League of Nations' treaty making activity took a turn and went into a direction that Rumanian international lawyer Vespasian Pella[17] had already suggested in 1925. However, neither of the two conventions[18] drafted by experts commissioned in 1934 by the League of Nations and finalized by a diplomatic conference in 1937 – whose text,

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13 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929.

14 Convention relative to the Treatment of Prisoners of War, 1929.

15 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

16 Kovács, 2002, pp. 135-144.; Monier, 2012; Müller, 2015, pp. 27-39.

17 „(...) la peine doit s'étendre à toutes les personnes physiques qui ont participé à la préparation des actes criminels ou qui ont eu l'initiative de leur accomplissement. Par conséquent, il faut punir les dirigeants politiques qui, par leur action, ont sciemment précipité les événements et ont occasionné ainsi un conflit armé entre leur Etat et un autre Etat." Pella, 1925, pp. 183-184.

18 Convention for the Prevention and Punishment of the Crime of Terrorism, 1937; Convention for the Creation of an International Criminal Court, 1937.

contrary to Pella's original idea, focused only on terrorism - received enough ratifications to enter into force.

The 1930s had already witnessed mass cruelties during Japan's aggression against China (e.g. the Nanking massacre[19], 1937) or Italy's aggression against Abyssinia (e.g. use of mustard gas at least at three battles and against thirteen cities or villages [20] in 1936) but World War Two revealed once again the problems of deliberate will to violate the well established rules, the discrepancy between the technical capacities of modern armies and the lack of adequate protection of the civilian population. The Hitlerian racial policy aiming the extermination of Jews in Europe by units of the SS and the Wehrmacht as well as with the complicity and even active collaboration of governments and administration in the occupied territories, the selective, racially or politically based denial of the rights of prisoners of war[21] after launching the Barbarossa plan are all terrific examples of the violation of basic rights of victimes of armed conflicts. The Japanese warfare in South-East Asia and at the Pacific was also marked by extreme cruelty and was based on another version of racial superiority feeling as manifested vis-à-vis local, civilian population and prisoners of war.

The trilateral declaration on atrocities[22], focusing only on crimes committed by Germans in Europe, warned already in 1943 of the *in*

19 Nanjing Massacre.

20 Grip and Hart, 2009, pp. 3-4.

21 The order called "Kommissarbefehl" denied POW status to the Communist political officers of the Soviet Army (see the English translation for example, at https://en.wikipedia.org/wiki/ Commissar_Order). POWs of Jewish origin were also often killed after capture or in camps.

22 „(...) three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:
At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. (...) Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the

*personam* serious legal and judicial consequences of these acts without being able to stop their commission. The declaration put also emphasis on deterrence and although still in an obscure manner, it evoked a joint prosecution of the most responsible ones and whose acts cannot be linked to a single state.

After the surrender of Italy (1943) followed progressively by the surrender of satellites of the Axis (1944/1945) ending in Germany's and then Japan's capitulation, the victorious powers realized their solemn promise and established the International Military Tribunal of Nuremberg (IMTN) and the International Military Tribunal of Tokyo (IMTT). These instances enjoyed competence over top German and Japanese war criminals. Occupying tribunals enjoyed penal jurisdictional competence on the basis of a separate regulation[23] over Germans suspected and charged with war crimes or crimes against humanity not falling under the jurisdiction of the IMTN. As to Italy and the satelllites (Bulgaria, Finland, Hungary, Rumania), they had already engaged themselves in the surrender agreements and later also in their peace treaties to put their own war criminals to trial at home or to extradite them to their victims' countries.

Procedure for eventual violations of the law of warfare by the Allies[24] was out of question at that time even if some issues incidentally emerged[25] during the Nuremberg trial.

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earth and will deliver them to their accusors in order that justice may be done. The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies." (Moscow Conference, October 1943).

23 Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, December 10, 1945.

24 The bombing policy („carpet bombing") practised by the British-American air forces, the destruction of Hiroshima and Nagasaki by atomic bombs or the mass expulsions, spoliation, and rapes committed by troops of the Soviet Army, conditions and abuses in Soviet POW camps as well as ethnic vengeance targeting minorities, etc., were evidently hardly compatible with internationally accepted humanitarian legal rules.

25 The International Military Tribunal of Nuremberg had to strike out the Katyn massacre from the list of German's war crimes, and Admiral Dönitz's defence

On the basis of the London Agreement[26], in its article 6, the Statute of the IMTN enumerated the following crimes[27] as falling under the jurisdiction of the International Military Tribunal of Nuremberg: crimes against peace, war crimes and crimes against humanity. The same structure with *grosso modo* the same content appeared in the Control Council Law No. 10 and in the peace treaties. (The Control

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successfully evoked the "tu quoque" principle in order to have his client acquitted of one of the charges. See Karl Doenitz.

26 Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminal of the European Axis, London Agreement of August 8th 1945.

27 Article 6.
„The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Nuremberg Trial Proceedings Vol. 1. Charter of the International Military Tribunal."

Council Law added a fourth pillar[28] covering the membership in the Gestapo, SS, SA, SD, the Oberkommando of the Wehrmacht, the nazi government and the leadership of the NSDAP, all criminal organizations as qualified in the judgments of the IMTN.) The peace treaties referred to the same three pillars, without containing however any enumeration, focusing mostly on the arrest and the extradition of those who were under investigation for crimes committed elsewhere.

As to the IMTT, established by an order of January 19, 1946. issued by Douglas McArthur, Supreme Commander for the Allied Powers[29], the enumeration of the crimes was nearly identical, but war crimes were covered by a general definition without any example[30] and the religous motif was absent from the crimes against humanity.

## 1.2. From Nuremberg to Rome

After the sentences[31] pronounced by the IMTN and the IMTT, the world had to think on how to continue. The philosophy of the famous *„Never again!"* was legally reinforced by the incorporation of the Nuremberg principles into a resolution of the United Nations' General Assembly, which solemnly recognized their customary law character and called the International Law Commission „to treat as a matter of primary importance plans for the formulation, in the context of a gen-

28 Article II/1 (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

29 International Military Tribunal for the Far East, 1946.

30 Article 5 (b): Conventional War Crimes: Namely, violations of the laws or customs of war.

31 The IMTN condemned to death by hanging Hermann Göring (who succeeded in committing suicide before his execution), Joachim von Ribbentrop, Wilhelm Keitel, Alfred Jodl, Hans Frank, Arthur Seyss-Inquart, Alfred Rosenberg, Wilhelm Frick, Fritz Sauckel, Julius Streicher, and in effigie Martin Borman. Rudolf Hess, Walther Funk, and Erich Raeder were condemned to life imprisonment, and imprisonment sentences were pronounced on Albert Speer, Baldur von Schirach, and Konstantin von Neurath, while Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were acquitted. The IMTT pronounced capital punishment on Doihara Kenji, Hirota Koki, Itagaki Seisiro, Kimura Heitaro, Macui Ivane, Muto Akiri, and Todjo Hideki, and 18 indictees were condemned to imprisonment of different terms.

eral codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal." [32] In a subsequent resolution, it gave a precise mandate to the International Law Commission to prepare a code on the crimes against peace and humanity.[33]

However, the decades following these solemn engagements showed a rather slow development characterized by reoccurring blocages and relaunched activity.

It is true, however, that the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), prepared by the way by an *ad hoc* experts comittee and not by the I.L.C. could be considered as a genuine success and the realization of the solemn promises.

In Article I of the Genocide Convention, „[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." The forms of perpetration, as enumerated in Article II, are practically *verbatim* identical with those which were listed in the London and Nuremberg documents focusing on the Holocaust as *crimes against humanity*. This article stipulates that „[i]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

However, although it closely followed the London and Nuremberg definitions, the draft code of crimes against peace and security of mankind, submitted in 1954 of the table of the General Assembly by

32 Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal.

33 Formulation of the principles recognised in the London Charter of the Nuremberg Tribunal and in the judgement of the tribunal.

the I.L.C. [34] was not discussed *in merito*. Even if it was put e.g., on the G.A. agenda of 1954, 1968 and 1974, governments were satisfied with short, formal discussions and promised future study of the question.

Governments generally referred to the lack of the legal definition of aggression in order to avoid the detailed discussion of the draft. They were also divided whether it is useful to amend the classic Nuremberg principles with dispositions penalizing other - contemporary well spread and largely used - actions and behaviours. Moreover, several governments questioned the feasibility of the project without an expressed will to establish a specialized international tribunal. (It is to be noted that the Genocide Convention alluded to the establishment of a tribunal having jurisdiction to adjudge individual cases[35], but States did not do too much to realize this commitment.)

An initiative submitted by Trinidad and Tobago put an end to this Cinderella-dream in the 1980's and finally, the I.L.C. put two drafts on the table of the governments: a Draft Statute for an International Criminal Court[36] (1994) and a Draft Code of Crimes against the Peace and Security of Mankind[37] (1996). The International Law Commission made the right step in the right direction.

The international jurisdiction – as suggested by the I.L.C. in the draft-statute – would have embraced four (traditional) crimes i.e., a) genocide, b) aggression, c) violation of the laws and customs of warfare, d) crimes against humanity completed with a fifth one i.e., e) crimes constituting the violation of different international conventions, enumerated in an annex[38].

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34 Draft Code of Offences against the Peace and Security of Mankind, 1954.

35 Genocide Convention, Article VI.
Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

36 Draft Statute for an International Criminal Court, 1994.

37 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996.

38 The annex referred to the following conventions: the four 1949 Geneva Conventions on the protection of victims of armed conflicts and their 1977 Additional Protocols; International Convention on the Suppression and

Surprisingly, these I.L.C. drafts received a much warmer welcome than before. The openness of the States was probably due to the political and psychological impact of the recent armed conflicts in ex-Yugoslavia and Rwanda and to the experiences of the functioning of the two international tribunals established respectively in 1993 and 1994 by the Security Council *acting under Chapter VII* with resolutions 827 (1993) and Resolution 955 (1994).

According to its statute, which was annexed to the report of the Secretary General of the United Nations and was approved by resolution 827(1993) which underwent later several modifications and was reissued in other resolutions[39], the International Criminal Tribunal for the former Yugoslavia (ICTY) was competent over *i.* war crimes, differenciated as grave breaches of the 1949 Geneva Conventions[40] or as breach of laws and customs of war[41], *ii.* genocide (with the 1948 components) and *iii.* crimes against humanity (enumerating in an exemplificative manner murder, extermination, slavery, deporation, imprisonment, torture, rape, persecution on political, racial or religious mobile and other inhuman treatment).

In the statute of the ICTR, the same crimes were mentioned (however in a slightly different order), but war crimes were defined as breaches of common article 3 of the 1949 Geneva Conventions and its Additional Protocol II. Terrorist acts were added thereto.

The minor conceptual differences of the statutes of the ICTY and ICTR were linked to the fact that while states were very divided

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Punishment of the Crime of Apartheid, 1974; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; Convention for the suppression of unlawful seizure of aircraft, 1970; Convention for the suppression of unlawful acts against the safety of civil aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988.

39 E.g., SC resolutions 1166 (1998), 1329 (2000).

40 Here, there was an exemplicative enumeration going from *a* to *h*.

41 Here an exemplificative enumeration going from *a* to *e*.

whether the ex-yugoslav conflict should be qualified as an international or a non international armed conflict, the civil war nature of the Rwandan tragedy was never contested. As to the ICTY, the war crimes that were enumerated can egally be understood in the context of international as well as non-international armed conflicts.

### 1.3. Rome and the adoption of the Statute of the International Criminal Court

The text of the Rome Statute[42], where one may discover at the same time the original proposals of the I.L.C. and the experiences of the ICTY and ICTR, had to be adopted by governments with different views and interests as manifested at the preparatory negotiations and at the Rome Diplomatic Conference.

The states remained divided concerning the jurisdictional competence over the crime of aggression (whether with or without a definition) as well as concerning the proposal to attach new crimes to the classical Nuremberg ones. Moreover, the question of the practical usefulness of the precision when defining the different crimes and the identical or different nature of certain crimes committed in an international or non-international armed conflict emerged again and again.

The preparatory works (*travaux préparatoires*) reflect rather well the conflicting and concurring proposals put forward until the very end of the discussions – see them especially in the Triffterer Commentary[43] - but the outcome of the final days was due to the heroic activity of the committee on the whole chaired by the Canadian Philippe Kirsch a suitable text from the very conflicting proposals. The result was submitted with the philosophy of *„take it or leave it"*. The text drawn up contains many consensual or by great majority backed formulas and is definitely a genuine and fantastic backbone, but, on the other hand, it is not easy to understand by a particular and is not void of lacunas, illogical textual position of dispositions on closely related institutions and their respective procedural roles and competences.

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42 International Criminal Court, 2021a (hereinafter: Rome Statute).
43 Triffterer and Ambos, 2016.

The text of the Rome Statute was finally adopted on July 17th, 1998, with 120 votes in favour, 7 against, 21 abstentions while 12 States did not participate in the voting. The adoption opened the way to signatures and ratifications. (In 2024, with Armenia's entry, 124 States are bound by the Statute but unfortunately, some very important States are still missing.[44])

Concerning aggression, the Rome Diplomatic Conference opted for a pragmatic-diplomatic solution by postponing the real decision saying that the jurisdiction of the International Criminal Court over aggression could only be materialized when States Parties agree upon a precise and legally binding definition of the crime of aggression.

Contrary to sceptics' prognosis, this approach seemed to be useful and in 2010, in Kampala, States Parties could surprisingly agree on the definition by adopting *quasi verbatim* the formulas contained in the famous resolution 3314 (XXIX) of the General Assembly. (It is however true that the French text shows a number of differences between the 2010 and the 1974 versions but none of them is materially important.)

Consequently, some new articles[45] had to be inserted into the Rome Statute and their entry into force had to be decided by the Assembly of States Parties, after the submission of the 30th instrument of ratification. Finally, in 2017, the Assembly decided to activate the competence over aggression if committed after July 17, 2018.[46]

As to the other crimes penalized by the Rome Statute, their formulation and position may be summarized as follows:

The crime of genocide with all its five traditional forms was given Article 6. Crimes against humanity are enshrined in Article 7 with a similar content as that of the ICTY and ICTR, but without the crime of terrorism although apartheid was added thereto.[47]

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44 The most important ones are the following: China, Russia, USA, Israel, India, Pakistan, Indonesia, and Malaysia. Excepting Jordan and Tunisia, Arab States did not join either.

45 Rome Statute, Articles 8bis, 15bis and 15ter

46 International Criminal Court, 2015a.

47 Rome Statute (hereinafter Rome Statute), Article 7, Crimes against humanity.
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

War crimes are inserted in Article 8, in a very precise manner and treated separately considering whether they were committed in an international or a non-international armed conflict. (This method, however, resulted in a considerable textual repetition.)

War crimes committed in the context of an international armed conflict are treated in two parts: Article 8, § 2, *a* and *b*.

While Article 8, § 2, *a* concerns the so called grave breaches of the 1949 Geneva Conventions, Article 8, § 2 *b* in its 26 subpoints enumerates the violations of the law and customs of war. Several of these points reflect the impact of different conventions forbidding the use of certain types of weapons or a certain manner of warfare.

Article 8, § 2 *c* and *e* are devoted to non-international armed conflicts casually called civil wars. Article 8, § 2 *c* repeats the four grave breaches of commun Article 3 of the Geneva Conventions, while Article 8, § 2 *e* incorporates 15 forms of violations of laws and customs to be applied during a civil war.

Nearly all the crimes hereby enumerated are defined with such a precision that could remind the reader of national military criminal codes. They are thus very different from the proposals submitted by the preparatory committee of the diplomatic conference (the „*PrepCom*") between 1995-1998 which put emphasis on the precise description of the three or four most important crimes. The finally adopted version – as already mentioned - is due to the *ad hoc* committee chaired by Philippe Kirsch, who explained that in the approach they had chosen the committee tried to synthetize the proposals of the

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(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of popula tion; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamen tal rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, eth nic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

national delegations and cite the core formulas of unanimously - or by a huge majority - accepted conventions banning some types of weapons of some types of warfare.

As a result, beside the breach of the most important conventions contracted on the protection of victims of armed conflicts (i.e., the so-called *Geneva Law*), the ICC's jurisdiction became also established over the violations of commitments of the conventions on the manner of warfare[48] (i.e., the so called *The Hague Law*). However, as a consequence of this approach the list of crimes falling under the ICC'ss jurisdiction became much longer than those which are considered by the Geneva Convention or their Additional Protocols as „grave breaches" of their dispositions. The adopted formulas became more precise than those proposed originally by the International Law Commission; moreover, the Assembly of States Parties adopted a special, *de jure* non-binding but very important interpretative document entitled „*Elements of crimes*", which explains the constitutive elements of the different crimes, one by one.

### 1.4. Possibility of enlarging the ICC's scope of jurisdiction?

It had already become clear during the preparatory works but later also in Rome that states are so divided concerning the acceptance of the ICC's jurisdiction over illegal trade of drugs[49] or terrorism that it was decided to set them aside provisionally with a reference, however, in the Final Act of the Rome Diplomatic Conference that the Assembly of States Parties may overview in the future whether the ICC's competence can be extended to these crimes as well.

Currently, international crimes can be symbolized by two concentric circles that can be enlarged. Most international crimes belong

48 E.g., i. Declaration (IV,3) concerning Expanding Bullets, 1899; ii. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954; iii. Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925.

49 Recall that Trinadad and Tobago put the idea to create an international criminal tribunal on the table of the General Assembly precisely to strengthen the fight against forbidden trade of drugs through the enhancement of international cooperation and the deterrence of the offend ers (1989); History of the ICC.

under the jurisdictional realm of the International Criminal Court. Prosecuting and jurisdictional power are exercised by the states as well as by the ICC. The principle of complementarity is the tool which helps to decide whether the ICC or the State(s) are entitled to act and to punish.

We have just mentioned that some crimes (e.g., drug smuggling, terrorism) are not covered by the Rome Statute, but, of course, this does not hamper the States' right to stand up in order to retaliate on the basis of the principle of the universal jurisdiction, confirmed by many international conventions they are contracting parties to.

There are also examples of other international tribunals or the so-called hybrid (mixed) international judicial bodies acting against perpetrators of crimes not included in the Rome Statute. This happened *inter alia* in Lebanon, in the procedure initiated against alleged perpetrators of the terrorist bombing killing PM Rafik Hariri and some of his colleagues. (Special Tribunal for Lebanon (STL), *see below*)

It goes without saying that the circle of international crimes is much larger than that of the crimes covered by the Rome Statute. It cannot be denied however that most international crimes – and especially the most important ones – are there. Their list can certainly be enlarged and the Rome Statute, putting emphasis on the procedural rules of how to amend, does not contain any material precondition for new crimes, object of a future amendment. Taking into account the realities and customs of international diplomacy, one might assume that chances depend first and foremost on the importance of the crime and the *quasi* unanimous will to punish it.

Three amendment packages have been adopted so far by the Assembly of States Parties.

The first package was adopted in Kampala (2010) where, beside the definition of aggression, States agreed to criminalize the use of poisonous or asphyxious gases and bullets which flatten easily in human body also in case of internal armed conflicts.

The second package was adopted in 2017 and it penalizes the use of *i.* microbiologic and toxic weapons and poisons, *ii.* weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays. *iii.* laser and other, similar

weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. These are crimes irrespectively of the fact whether they were committed in an international or non international armed conflict.

The third package dates back to 2019 and concerns the prohibition of starvation as a method of warfare also in a non-international armed conflict.

Even if adopted by the Assembly of States Parties, states still must ratify these amendments in order to be binding on them. In 2021, the *ratio* of ratifications is unfortunately not very promising... [50]

## 2. THE PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT

### 2.1. Which are the most serious crimes and what is complementarity?

The jurisdiction of the International Criminal Court is based on the satisfaction of the preconditions settled in the Rome Statute. The ICC does not *per se* enjoy competence over the above outlined four main crimes: the Rome Statute put emphasis on the 'most serious crimes' and the observation of the rule of 'complementarity' already in its preamble and article 1 [51], but these expressions and their technical details reappear several times in the subsequent articles.

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50 As of June, 2024, the amendment on aggression was ratified by 45 States, but the other elements of the first package only by 45, the second respectively by 16 or 18 (16 concerning crime of using plastic bullets, X-ray weapons and laser weapons, 18 concerning crime of using biological weapons) and the third (prohibition of starvation in non-international armed conflict) by 14. See: https://asp.icc-cpi.int/en_menus/asp/RomeStatute/Pages/default.aspx

51 Rome Statute, Preamble:
"The States Parties to this Statute, (...) Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

The qualification as 'most serious' shall not be understood as only referring to the extreme cruelty of a criminal act but *inter alia* the large scale of crimes, their organized patterns, their planification etc. can substantiate its evocation, as the reader may find it the introductory part („chapeau") of the articles on crimes against humanity[52] and war crimes[53]. The realization of the criteria of the *chapeau* constitutes the contextual elements of the crime.

Complementarity means that the International Criminal Court steps in if the state is apparently *unable or unwilling* to exercise the criminal prosecution. If the prosecution was engaged on a national level and is managed diligently or if it is fully accomplished and in case of condemnation, the sanction pronounced is adequate with the crimes committed and under both hypotheses, the principles of the rule of law and the fair trial were duly observed, the ICC does not need to proceed because the double jeopardy principle (*ne bis in idem re*) forbids a second condemnation for the same act. The same rule applies also in case of an acquittal, pending its pronouncement solely on the scrupulous observation of the fair trial requirements.

However, if the state knowingly does not proceed or if the procedure amounted a condemnation but the sanction seems to be manifestly mild, the ICC enjoys jurisdictional competence providing the *ratione loci* or *ratione personae* preconditions (see below) are met. The

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Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, (....) have agreed as follows:
Article 1 The Court An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute and shall be complementary to national criminal jurisdictions (...)."

52 Rome Statute, Article 7, Crimes against humanity:
"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (....)."

53 Rome Statute, Article 8, War crimes:
"1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes (...)."

ICC is also empowered to adjudge when the state is unable to prosecute and punish, which could be the effect of a prolonged civil war, the total or partial collapse of the public administration or the lack of staff and/or truly independent judiciary.

### 2.2. Competence based on territory or nationality and the importance of the peculiar timeframe (Jurisdictio ratione loci, ratione personae & ratione temporis)

The jurisdictional competence of the International Criminal Court is based first and foremost on two hypotheses: the ICC is competent when the crime is committed *i.* on the territory of a States Party to the Rome Statute or *ii.* by a national of a States Party.[54]

Huge continuous debates surrounded the formulation of these two pillars and one of the main issues was always whether the State's consent is needed or not, or eventually under what conditions. The other *hot potatoe* was whether the ICC may enjoy competence over nationals of States that do not ratify the Statute and if it does, under what conditions.

The finally chosen solution was at the same time legal and political/diplomatic.

As the idea of the need of States Party's consent as precondition of proceedings was continuously rejected by most of the participants of the diplomatic conference, it was not included in the adopted text.

Concerning the question of the impact of the Rome Statute on non-States Parties, there are two alternative solutions.

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54 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction:
"1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national. (...)."

On the one hand, if a non-States Party accepts *in concreto* the ICC's competence[55], we meet a well-known exception from above the rule of the *pacta tertiis nec nocent, nec pro sunt.*

The second exception is however related to competences attributed to the Security Council by Chapter VII of the United Nations' Charter: the Rome Diplomatic Conference agreed to recognize certain competences to the Security Council in the context of the jurisdiction under the Rome Statute.[56] Even if this is absolutely correct legally, it is obvious – and the cca. 75-year long history of the UNSC has proved it abundantly – that most of the permanent five members of the top organ of the United Nations too often act (or more precisely, miss to take the obviously needed step) following their own geopolitical interests instead of observing their responsibility under the Charter and general international law.

The Security Council was also granted with other prerogatives[57] in the Rome Statute and the jurisdiction over aggression had to be

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55 Rome Statute, Article 12, Preconditions to the exercise of jurisdiction:
"(...) 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

56 Rome Statute, Article 13, Exercise of jurisdiction:
"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15."

57 See e.g., Rome Statute, Article 16, Deferral of investigation or prosecution:
"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." See also Article 53(2), (3), Article (5)(b), (7), Article 115.

also adjusted with special rules[58] aiming to assure the harmony with Chapter VII of the UN Charter.

It should be emphasized however that from a truly theoretical point of view, the legal situation is not at all easy to understand and to match with classic rules of international law. On the one hand, as a result of the interplay of the above mentioned r*atione loci* and *ratione personae* rules if the crimes are committed on the territory of a States Party, the ICC's competence is established over perpetrators, irrespective of their citizenship whether belonging to a States Party or a no-States Party. On the other hand, it is to be asked why such a solution, while definitely settled in the Rome Statute *inter partes*, should have a binding impact on non-States Parties whose nationals are allegedly involved and whose cooperation is very important for an expeditious procedure. (It should be pointed out nevertheless that the *hot potatoe* issue of the eventual jurisdiction over nationals of non-States Parties did not prevent the continuous participation of States advocating for a *sine qua non* consent to this form of jurisdiction, even though this position got defeated in indicative and real votings during the negotiations.)

The ratione temporis principle should be understood i. first, as a general rule[59], excluding the retroactive effect of the Rome Statute on facts prior to its entry into force, i.e., July 1st, 2002. ii. It is equipped with a secondary rule, that if a State becomes bound only later by the Rome Statute, the entry into force of its instrument of ratification prevails.[60] iii. Thirdly, a State may mandate the ICC to exercise its

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58 See Rome Statute, Articles 15bis (Exercise of jurisdiction over the crime of aggression (State referral, proprio motu)) ad 15ter. (Exercise of jurisdiction over the crime of aggression (Security Council referral)).

59 Rome Statute, Article 11, Jurisdiction ratione temporis
1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. (...).

60 Rome Statute, Article 11, Jurisdiction *ratione temporis* (...)
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.

jurisdiction on events having occurred prior to this date.61 iv. Fourthly, the ratione temporis rule applied with the date July 17, 2018, on States Parties having ratified by then the Kampala Amendment on the Aggression; v. Fifthly, if a State becomes bound only later by this Amendment, the precise date of the entry into force of the instrument of ratification prevails. vi. In case of minor amendments concerning additional crimes to the Rome Statute, the date of the entry into force of the amendment should be taken into consideration or the date of the entry into force of the instrument of ratification if it is posterior concerning the given State Party.

### 2.3. The main organs of the International Criminal Court

The main organs of the International Criminal Court are the following: *i.* the Judiciary, *ii.* the Office of the Prosecutor (OTP), *iii.* the Registry, *iv.* the Assembly of States Parties (ASP).

Due to its importance and its special, autonomous status, I think that the Trust Fund for Victims should *de facto* be considered as one of the main organs as well.

Eighteen judges, elected for a single nine-year term by the Assembly of States Parties, work in Pre-Trial Chambers (PTC), in Trial Chambers (TC) or in the Appeals Chamber (AC). They elect their president from themselves for a three-year term. The election of judges is organized in such a manner that – exception made of a judge's passing away during office term or his eventual demission, etc. – every three year, the Assembly of States Parties elects six judges who have an extensive practice in criminal law or are recognized international law experts of the academic world.[62] The judges are elected with a

61 See Rome Statute, Article 11 (2), last part of the paragraph. (The reference on precited article 12(3) means the *mutatis mutandis* applicability of the rule of consent as it works in case of a non-State Party.)

62 Rome Statute, Article 36, Qualifications, nomination and election of judges
1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court. (...)
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

two-third majority and the equitable geographical representation and the fair representation of female and male judges should also be taken into consideration during the election process. The candidates presented by States Parties are auditioned and evaluated by an Advisory Committee on nominations, established by the ASP and composed mostly of former ICC judges. The candidates are also auditioned by representatives of NGO-s in a public hearing.

The control that the three-member *Pre-Trial Chambers* perform over the activity of the prosecutor is similar to the task of the *juge d'instruction* in national systems. However, the PTC does not investigate, its most important duty is to assess the OTP's materials and decide whether they can be considered as sufficient for sending a person under investigation to trial: this decision is the confirmation of charges. The Rome Statute defines with precision all the fields where the Pre-Trial Chambers check and counterbalance the prosecutor's activity. The three-member Trial Chambers deal with the first instance trials and the five-member Appeals Chamber has to adjudicate interlocutory and *in merito* appeals.

The *Office of the Prosecutor* carries out the investigations, submits the charges and represents them before a Trial Chamber if confirmed by a Pre-Trial Chamber.

The *Registry,* beside the general housekeeping management of the daily work of the ICC, deals - through its different specialized units - *inter alia* with *i.* the representation of witnesses and assistance to them, *ii.* the custody of detainees arrested and transfered to The Hague, *iii.* the assistance given to the defence, *iv.* some aspects of foreign relations and judicial cooperation with national authorities, etc.

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(b) Every candidate for election to the Court shall:
(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

The *Assembly of States Parties* elects the judges – as already mentioned above - and the Prosecutor, whose term of office is nine years. The ASP approves the budget and adopts and modifies the Rules of Procedure and Evidence and the related statutory documents. It can amend the Rome Statute (sometimes in the framework of a review conference). The Rome Statute enumerates the issues which must be adopted with 2/3 majority or with 7/8 majority and those which require ratification by States.[63]

The *Trust Fund for Victims* enjoys a special autonomous status in the system. It handles the reparation and the assistance due to victims from the assets resulting from confiscated property of convicted persons and voluntary contributions on behalf of states, legal persons and individuals.

### 2.4. Referrals, Situtations and Selection of Cases

In terms of the Rome Statute, the International Criminal Court can adjudge crimes that were committed on the territory of a State Party or by a national of a State Party. Any State Party may call the Prosecutor's attention to such crimes, irrespectively of the fact whether it was 'territorially' or 'nationally' involved in their commission. It might even take this step without without being directly linked to the crimes.

When a State submits a *situation* to the ICC, it falls upon the Prosecutor to decide which is or which are the precise *case(s)* that will be investigated. When making his choice, the Prosecutor takes into consideration the character and the gravity of the crimes, the number of the victims, the impact of the crimes on the given state or on its neighbourhood, etc.

However, the Prosecutor is also entitled to step in *ex officio* (or according to the language of the Rome Statute: *proprio moutu*) on the basis of acquired or commonly known information or individual communications, etc. but only vis-à-vis States Parties. The above enumerated elements of case selection and prioritisation must be observed in this case as well. Preliminary examination is automatically granted

63 Rome Statute, Articles 121-123.

but if the Prosecutor would like to enter in the actual investigations, he should ask the Pre-Trial Chamber for approval. The PTC grants the request only when the submitted materials prove//support//justify that 'there is a reasonable basis to proceed'.[64]

A third possibility is when the referral comes from the Security Council acting under Chapter VII. Such a referral may concern States Parties but also non-States Parties.

The Prosecutor enjoys a great margin of freedom of appreciation during these procedures: he is not bound by any legal or factual position expressed either in the State or in the UNSC referral.

The Prosecutor should check whether both the jurisdiction criteria (subject matter jurisdiction analysed *ratione loci, ratione personae, ratione temporis)* and the admissibility criteria are met. A case is inadmissible if it runs against the *ne bis in idem re* principle[65] or if it is not of „sufficient gravity to justify further actions by the Court".[66] The Prosecutor does not initiate an investigation if the admissibility

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64 Rome Statute, Article 15, Prosecutor
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

65 Rome Statute, Article 20, *Ne bis in idem*
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise, were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

66 Rome Statute, Article 17, Issues of admissibility, 1(d).

criteria are not met or if „there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".[67]

Contrary to the procedure of the *proprio motu* referral, if the referral comes from states or from the Security Council, the Prosecutor exercises his investigative competences without the permission of a Pre-Trial Chamber. The proceedings in this case follow a reversed logic i.e., if the OTP stops its inquiries within the preliminary examination phase and does not continue the investigations, the referring party may ask the PTC to exercise a kind of revision about the well-foundedness of the OTP's decision not to investigate. If the OTP's decision is based solely on the reference to the interests of justice, the PTC may review it *ex officio*.

If the PTC concludes that the OTP's position – in the above matters – is not substantiated, it may order the OTP to reconsider its position. Nevertheless, after reconsideration, the Prosecutor may arrive at the same conclusion as before, i.e., there is no need to investigate. The Prosecutor enjoys thus a huge margin of independence. (Nonetheless, such a reconsideration may take a long time and could be subject to litigation concerning the elements that can be examined when assessing gravity, the appreciation of a genuine reconsideration and the precise competences of a PTC when reviewing the assessments etc. as seen in the so-called situation of Registered Vessels of Comoros, Greece and Cambodia.[68])

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67 Rome Statute, Article 53, Initiation of an investigation
1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

68 International Criminal Court, 2017a.

As to the touchy issue of the '*interests of justice*', it is to point out that here - as the Appeals Chamber clarified it in a judgment rendered about the situation in Afghanistan -, a PTC may not stop the procedure by referring *proprio motu* to the interests of justice if this was not put on the table *expressis verbis* by the OTP.[69]

As the choice of a *case* (or some *cases*) from situations has received a lot of criticism on behalf of governments as well as non-governmental organizations, the OTP has delivered several public documents explaining different aspects of its case selection policy.[70]

The Prosecutor must check whether genuine national prosecutions have not been launched or accomplished in the case under selection and it has to pay attention to the eventual home procedures when dealing with the given case(s). The OTP's assessment is verified by the Pre-Trial Chamber or if the charge has already been confirmed by a PTC, this question may emerge before a Trial Chamber as challenge of jurisdiction. The challenge of complementarity can be submitted by the person against whom a decision of arrest warrant has been submitted or charges have been formulated, waiting for their confirmation by a PTC. Governments are also entitled to submit a challenge of jurisdiction based on the principle of complementarity. Even if complementarity is to be examined *ex officio,* if a challenge is submitted, the onus of the proof of the satisfaction of the criteria of *ne bis in idem re* is on the shoulders of the challenging government or person.

All this means that if national governments open investigations and put perpetrators on trial at the latest during the preliminary examination period or in the investigation phase of the proceedings of the International Criminal Court and the home procedures satisfy the criteria of fair trial and rule of law and in case of condemnation, the sentenced punishment is adequate with the crime committed, the conditions of the ICC's jurisdictional competence are not met in the given case.

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69 International Criminal Court, 2020a; International Criminal Court, 2020b; International Criminal Court, Office of the Prosecutor, 2020d.

70 International Criminal Court, Office of the Prosecutor, 2016a; International Criminal Court, Office of the Prosecutor, 2014a; International Criminal Court, Office of the Prosecutor, 2016b; International Criminal Court, Office of the Prosecutor, 2021a; etc.

## 2.5. Imprescriptibility, irrelevance of immmunity and fair trial rights

The crimes listed in detail in the Rome Statute cannot be subject to prescription[71] and the immunities attributed constitutionally to some high state officials cannot prevent the International Criminal Court from exercising its jurisdiction.[72]

The International Criminal Court shall not only prosecute and punish at all costs, but it is imperative that it carries out this task through the scrupulous observation of human rights concerning especially those who are already in the confirmation or in trial phase. These rights are the classic human rights enumerated in similar terms in the different human rights instruments of the world. They were also inserted in the Rome Statute, although, in a surprising way, they do not appear in one block but emerge at different parts of the document.

One may find the *nullum crimen sine lege*[73], the *nulla poena sine lege*[74] and the non-retroactivity[75] principle as well as the principle of individual responsibility[76] under Part 3, among the "General principles of criminal law".

The other traditional procedural rights are mentioned in the context of the different procedures, like the rights of persons during

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71 Rome Statute, Article 29, Non-applicability of statute of limitations
The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

72 Rome Statute, Article 27, Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

73 Rome Statute, Article 22.

74 Rome Statute, Article 23.

75 Rome Statute, Article 24.

76 Rome Statute, Article 25.

an investigation[77] and the rights of the accused[78]. The presumption

77 Rome Statute, Article 55, Rights of persons during an investigation
1. In respect of an investigation under this Statute, a person:
(a) Shall not be compelled to incriminate himself or herself or to confess guilt;
(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

78 Rome Statute, Article 67, Rights of the accused
1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same

of innocence makes part of the rights related to the investigation phase[79], but was granted a distinct article in the articles devoted to the trial phase.[80]

## 2.6. The three evidentiary standards

During its proceedings, the International Criminal Court must use different evidentiary standards when rendering its decisions.

In order to grant the Prosecutor's request to open *proprio motu* an investigation, the Pre-Trial Chamber should be satisfied that there is a *reasonable basis* to proceed.[81] This standard is generally considered

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conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) To make an unsworn oral or written statement in his or her defence; and
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

79 Rome Statute, Article 55, 2 (b), (cited *supra*)

80 Rome, Statute, Article 66, Presumption of innocence
1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

81 Rome Statute, Article 15, The Prosecutor (...)
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. (...).

as being the same as that of the *reasonable ground* which is required for issuing an arrest warrant.[82]

However, a considerably higher legal conviction, i.e., the *substantial reason to believe* is required for the confirmation of charges by the PTC.[83]

Furthermore, when it comes to condemning the accused for the commission of the charged crimes, the classic rule of necessity to have a conviction *beyond any reasonable doubt* applies.[84]

## 2.7. Sentencing ...

If the culpability is established, the International Criminal Court may pronounce an imprisonment penalty up to 30 years, depending on the gravity of the crime. Exceptionally, even a sentence of life imprisonment can be delivered. Moreover, confiscation of property and obligation to participate in the covering of the costs of reparation can also be constitutive elements of the judgement.

The ICC has no prison of its own. Instead of building or buying one, it was decided to keep people under provisional arrest in an annex rented within the Scheveningen detention center of The Hague, together with other international criminal tribunals (ICTY, ICTR, etc) established in the city. In case of being sentenced, the perpetrator

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82 Rome Statute, Article 58 Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear
1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; (...).

83 Rome Statute, Article 61, Confirmation of the charges before trial, (...)
5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. (...)
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. (...).

84 Rome Statute, Article 66, Presumption of innocence (...)
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

stays in this compound until the presidency of the ICC comes to an agreement with a state which is ready to offer its institutions for the rest of the imprisonment, from which the time elapsed in provisional arrest is to be deducted.

Before end 2021, condemnation judgments were pronounced in the following cases: *i.* recrutement and use of child-soldiers during the civil wars in Congo (Thomas Lubanga case[85]); *ii.* murder, pillage of civil population and recrutement and use of child-soldiers during the civil wars in Congo (Bosco Ntaganda case[86]); *iii.* the massacre of Bogoro during the civil wars in Congo (Germain Katanga case[87]); *iv.* destruction of religious and historical monuments in Timbuktu (Mali) which were on the UNESCO world heritage list (Al Mahdi case[88]). *v.* pillage, destruction and rape during the civil war in the Central African Republic (Jean-Bemba Gombo case[89]) and *vi.* the related Bemba et al. case[90] which concerned offences against administration of justice, during the main procedure of the ICC; *vii.* murder, pillage, rape, sexual slavery during the armed conflict in Uganda (Dominic Ongwen case[91])

As to the precise length of the sentence of imprisonment, the different trial chambers took into consideration the specificities of the crimes, the character of the contribution of the condemned perpetrator to the crime, the condemned person's eventual repentance, the impact of the crimes on victims, communities, the country and eventually also in the neighbouring countries.[92]

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85 The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.

86 The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06.

87 The Prosecutor v. Germain Katanga, ICC-01/04-01/07.

88 The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15.

89 The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08.

90 The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13.

91 The Prosecutor v. Dominic Ongwen, International Criminal Court, 2021b.

92 Thomas Lubanga: 14 years; Germain Katanga: 12 years; Jean-Pierre Bemba Gombo (in first instance, overruled by the acquittal in appeal):18 years; Ahmad al-Faqi al Mahdi (guilty plea): 9 years; Dominic Ongwen (in first instance, under appeal still pending): 25 years; Bosco Ntaganda: 30 years; In the case of Bemba et al, Jean-Pierre Bemba Gombo was sentenced to 1 year, Aimé Kilolo Musamba: 3 years, Jean-Jacques Mangenda Kabongo: 2 years, Narcisse Arido:

Currently, the following procedures are under trial: *i.* the responsibility of the deputy commandant of the Islamic Police of Timbuktu for torture, rape, sexual slavery, condemnation without fair trial, destruction of historical and religious monuments etc. during the rule of the Islamists (Al Hassan case[93]); *ii.* murder, torture, destruction of civilian property during the civil war in the Central African Republic by units of the (christian) Anti-Balaka militias (Yekatom and Ngaïssona case[94]). Because charges were recently confirmed against Mahamat Said Abdel Kani[95], alleged leader of Seleka militias, composed mostly of muslims, the crimes of the other side of the civil war of the Central African Republic will also be examined in trial.) The background of the Yekatom and Ngaissona case and Abdel Kani case is related to the fact that predominantly the believers of the other religion were targeted by militias, each of them advocating for self-defence and retaliation.) *iii.* and another offence against the administration of justice (Paul Gicheru case)[96].

The trial against a leader of the Janjawed militia, with confirmed charges of crime of murder, rape, destruction of property, forcible transfer of the population committed in the Darfur region of Sudan (Abd-Al-Rahman case[97]) opened in 2022.

It is to be noted that the International Criminal Court has acquitted several indictees or pronounced decision about "stay of the proceedings". These are the following: *i.* the Bemba case, where the Appels Chamber acquitted the indictee as to the crimes committed in the CAR while approved the condemnation and sentence for offence

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11 months, Fidèle Babala Wandu: 6 months. However, taking into account that these sentences had to be deducted from the time effectively spent in the the ICC's detention center, these penalties do not need to be served after their pronouncement.

93 The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18.

94 The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18.

95 The Prosecutor against Mahamat Said Abdel Kani. International Criminal Court, 2021c.

96 The Prosecutor v. Paul Gicheru, ICC-01/09-01/20. (However, the case had to be stopped soon, because the indictee passed away in Kenya.)

97 The Prosecutor v. Ali Muhammad Ali Abd–Al-Rahman, ICC-02/05-01/20.

against the administration of justice. *ii.* the massacre in Bogoro, where one of the accused was condemned, the other was acquitted because the OTP's evidence was not considered as proven without any doubt (Ngudjulo case[98]). *iii.* the head of state and his deputy in a case related to crimes against humanity perpetrated during post-electoral violences in Kenya, (Kenyatta case[99] and Ruto case[100]), *iv.* the head of state and one of his ministers in a case also related to crimes against humanity perpetrated during post-electoral violences in Côte d'Ivoire (Laurent Gbagbo and Charles Blé-Goudé case[101]).

Moreover, several investigations did not lead to a trial case e.g., because the person under investigation died in the meantime or the charges were not confirmed by the given Pre-Trial Chamber and the OTP did not produce more solide evidence.

Beside the already mentioned trial and pre-trial cases, it is worth mentioning that in a good number of situation countries, whether in Africa[102], the Middle East[103], Asia[104], South America[105] or Eastern Europe[106], preliminary examinations or investigations have been launched if needed, with the approval of a Pre-Trial Chamber.

## 2.8. The cooperation with the ICC challenged by local realities of situations and turbulences of great politics

"International law is based on the cooperation of states." – every law student will learn this basic statement right at the first lecture on international law. The sentence will be repeated later nearly at all the

98 The Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12.
99 The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11.
100 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
101 The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15.
102 International Criminal Court, 2014a.
103 International Criminal Court, 2021d.
104 International Criminal Court, 2019a; International Criminal Court, 2021e; International Criminal Court, 2020a.
105 International Criminal Court, 2021f; International Criminal Court, 2021g.
106 International Criminal Court, 2016a; International Criminal Court, 2022a; International Criminal Court, 2019a; International Criminal Court, 2021e; International Criminal Court, 2020a; International Criminal Court, 2021d.

conferences contributing thus *nolens volens* to the well-known scepticism of non international lawyers vis-à-vis the *jus gentium*.

Cooperation is especially important for the work of the International Criminal Court having no special enforcement mechanism to impose its will on governments.

The Rome Statute devotes a special chapter (Part 9) to the cooperation with States Parties and with non-States Parties. The rules on the cooperation with States Parties are based on the Rome Statute itself, while special agreements need to be contracted with non-States Parties. However, if the given 'situation' was put on the ICC's agenda *via* referral by the Security Council, when the state in question is member of the UN, the special agreement is not forcibly needed.

In the framework of the Rome Statute, the organ designated to act in case of failure to cooperate is the Assembly of States Parties, which is, however, not empowered with hard competences in the matter. (In case of a UNSC referral, on the ICC's demand, the Security Council is entitled to assess the failure and eventually sanction with all its powers under the Charter of the United Nations.)

Even if States Parties are generally keen to cooperate, one may identify some typical problems and difficulties. *i.* The first is the internal situation of the state where the crimes were committed, and which might be afflicted with an ongoing armed conflict or with the outbreak of epidemies or the slow working capacity of the public administration. *ii.* The second problem is of political nature. In spite of the fact that most of the so far adjudged cases were put on the ICC's table through self-referral (i.e., the territorial state referred the situation to the ICC), the false perception was created and artificially reinforced that the ICC is "biased" and targets only Africa. This perception also resulted in a certain regional solidarity within the African Union in favour of Omar Hassan Ahmad Al-Bashir, the – since then already destituted and arrested – Sudanese head of State, against whom a warrant of arrest was delivered in the context of the investigation of the genocide allegedly committed in Darfur, a situation referred by the UNSC to the ICC. On the other hand, States denouncing or not ratifying or even not signing the Rome Statute regularly invoke the issue of the *pacta tertiis nec nocent, nec pro sunt,* especially when the

investigation could concern their nationals.[107] There was also a time when the then ICC's Prosecutor Fatou Bensouda and one of her collaborators were targeted with *in personam* sanctions for investigating in the Afghanistan situation against American personnel.[108]

But as always, there are also examples of good cooperation: from time to time, depending on the recognition of common interests in a given 'situation', a certain cooperation was realized between the ICC and the USA[109] which resulted *inter alia* in Dominic Ongwen's and Bosco Ntaganda's arrest and their transfer to the Hague.

There are also agreements contracted about technical details of the cooperation with States Parties, *inter alia* about field-offices in some of the situation countries and modalities of interactions. Let's also mention cooperation agreements contracted with the United Nations and the European Union and the memoranda of understanding with the Interpol, Europol, etc

There is generally good cooperation between the ICC and most of the situation countries as well as countries hosting victims or witnesses. The transfer of documents of national investigations, the searching and freezing indictees' eventual foreign assets, the cooperation in the witnesses' travel to The Hague or in the long-distance video-hearings go smoothly, with great operativity. The same can be said about the offer of imprisonment facilities for the condemned to serve the sentence pronounced by the ICC, etc

### 2.9. The victims' participation during the proceedings and the importance of the assistance and reparation to victims

One of the main novelties of the Rome Statute is the victims' institutionalised position during the whole proceedings: they are no longer just people that the parties are speaking about or who are eventually listened to as witnesses of their own case, but they enjoy a *sui*

107 International Criminal Court, 2021d; International Criminal Court, 2016a; International Criminal Court, 2022a.

108 These sanctions imposed by US president Donald Trump were revoked by President Joe Biden.

109 This happened under Barack Obama's presidency.

*generis* status during the investigation, the pre-trial and the trial. While the status of "party" is reserved at these stages to the OTP and the defence, victims, through their chosen common representatives (private lawyers or the Office of Public Counsel for Victims (OPCV) belonginging to the Registry) have access to the submitted documents, may react on them, may submit their own views and ask the witnesses questions or can even call witnesses of their own. In the meantime, it should be born in mind during trial that they cannot act as a prosecutor-*bis,* their interventions should not be related to the actual facts (i.e., what happened, why did it happen?) but to their perception of these facts and the impact they had on them as victims, on their families or their communities.)

If the accused's culpability is established at the end of the procedure, victims are entitled to reparation. During the reparation phase, the parties are the "defence" and the "victims". At this stage, the OTP does not need to play any role.

Even if the condemned perpetrator is obliged to assume the full reparation of the harms caused, in most of the cases – according to the experiences – this would not help *in concreto* because most perpetrators are indigent. Moreover, the case policy of the OTP and the importance of the contextual elements of the crimes against humanity and war crimes target mostly – and understandably – crimes with a huge number of victims. As a consequence, full reparation is reasonably impossible even if the condemned person is supposedly wealthy.[110]

All this means that the simple promise to repair is not enough and intervention is needed on behalf of the international community. As already touched upon under sub-point 2.3., this activity is realized through the Trust Fund for Victims (TFV) under the judicial control of a trial chamber. The budget of the TFV is supplied by imposed fines (*'own resources'*) and voluntary contribution from States and individuals (*'other resources'*). Theoretically, the TFV only advances the costs of the reparation and ICC's Presidency could initiate a

110 To date, the only really wealthy indictee was Jean-Pierre Bemba Gombo, condemned at first, but acquitted at second instance.

procedure for reimbursement if the condemned perpetrator's financial situation has changed and he is no longer indigent.[111] The amount of the due reparation is established by a Trial Chamber and on the basis of the reparation judgement, the TVF should prepare a precise plan about the implementation and to collect the necessary amount of money for the programs. The planification, the collect and the implementation are organized under the *'reparation mandate'* and are supervised by the judges.

The Trust Fund for Victims can take care of the victims of the situation eventually already prior to the perpetrator's condemnation when medical or other humanitarian actions are urgently needed. It can also happen that not all the victims concerned by a situation will be eligible for reparation, e.g., because the crimes committed against them do not make part of the case (See for example an enduring civil war where only some special years or some precise attacks were chosen or when the person under investigation and allegedly responsible for given atrocities died in the meantime during a battle.) In case of acquittal, there is no condemnation, consequently there is no obligation of reparation, even if there is a huge number of victims in need.

The *'assistance mandate'* was established to provide for such cases. It is also performed by the TFV within a considerable margin of freedom and financed from the *'other resources'*.

However, despite the theoretical importance of the distinction between *'assistance mandate'* and *'reparation mandate'*, considering the limited available resources, in practice, the actual services are very similar under both mandates, priority given to necessary medical and psychological intervention, schooling, eventually complemented with help to rebuild a destroyed dwelling or to relaunch a micro-agricultural or artisanal activity.

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111 No such change has occured so far that would render a reimbursement appropriate.

## 3. THE ICC AND THE OTHER INTERNATIONAL CRIMINAL TRIBUNALS AND HYBRID TRIBUNALS

### 3.1. Other international criminal tribunals

Even if the presentation of the long way to the establishement of the ICC as a permanent international criminal tribunal might give the impression that since then, one single court should be enough to put an end to impunity, this is not the case.

The ICTY[112] and the ICTR[113] could accomplish most parts of their original mandate by condemning the most important perpetrators of crimes during the ex-yugoslav and rwandan armed conflicts, but even the execution of judgments necessitates judicial supervision and decision making. However, the ICC could not step in because of the strict time limit enshrined in the Rome Statute (i.e., the *ratione temporis* competence). As a consequence, the Security Council decided to set up the Mechanism for International Criminal Tribunals[114] in order to deal with judgments under appeals and issues of execution of the imprisonment penalties.

### 3.2. The hybrid tribunals

Similarly, the prosecution by the ICC for the atrocious crimes committed under the Red Khmer rule in Cambodia after 1975-1979, or by Charles Taylor in Sierra Leone in 1996-2003 or by Hissène Habré in Chad between 1982-1990 etc. would have run against the *ratione temporis* principle. That's why special, so-called hybrid tribunals like *i.* the Special Tribunal for Sierra Leone (STSL), *ii.* the *Extraordinary Chambers in the Courts of Cambodia* (ECCC), *iii. Extraordinary African Chambers* (EAC) were set up concerning the crimes committed

112 Of the 161 indictees, 83 were condemned e.g., Radovan Karadjic, Ratko Mladic. Slobodan Milocevic, the mastermind of the ethnically colored armed conflict died in the detention center, in the middle of his procedure. The indictees and the condemned persons include not only Serbian but also Croat and Bosniak politicians, officers, and soldiers.

113 Of the 93 indictees, 62 were sentenced to imprisonment, e.g., Jean Kambanda, Jean Paul Kayesu, Jean Bosco Barayagwiza.

114 Statute of the Mechanism for International Criminal Tribunals, 2010, Annex 1.

in these countries through agreements contracted by Sierra Leone[115] and Cambodia[116] with the United Nations or Senegal[117] (hosting the destituded president Habré) with the African Union. Their common element was the simultaneous presence of national judges and international judges, and their budget was mostly covered by the United Nations.

The *Special Tribunal for Libanon* (STL) was created in order to put to trial the perpetrators of the murder committed by bombing against PM Rafik Hariri and some of his collaborators. The legal difficulties of putting the case before the ICC were numerous: neither Lebanon, nor Syria (the country where the perpetrators arrived from and returned to) are not States Parties, terrorism or terrorist acts are enumerated neither in article 7 (crimes against humanity), nor in article 8 (war crimes) of the Rome Statute and the *„chapeau"* of these two articles (see subpoint 2.1., above) could also be considered as not totally fitting in this case. In answer to these difficulties, the UNSC decided to establish a special court[118] for the purposes and an agreement was subsequently contracted between Lebanon and the United Nations.[119]

The ICTY was competent - as we have seen above - on war crimes and crimes against humanity committed during the ex-yugoslav conflict and the indictees were mostly Serbian, Bosniak and Croat soldiers, officers and politicians. Later, it became clear that the first paramilitary then also political formation called UÇK, set up in order to protect Kosovars from their massive deportation or forced expulsion, also seemed to be involved in the commission of crimes, partly war crimes but according to alarming reports, illegal trade with human organs[120] as well.

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115 United Nations, 2002.

116 United Nations, 2003.

117 Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.

118 S.C. Res. 1757, 5685th mtg, 30 May 2007, S/RES/1757 (2007), Annex.

119 Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Beirut, 29 January 2007 & New York, 6 February 2007.

120 Marty, 2011.

The jurisdictional competence of the ICTY was however prevented by the already taken UNSC decision to close it by transforming it into the residual mechanism. However, there was an even more important obstacle i.e., the lack of the crime of illegal trade with human organs in its statute. The same lacuna can be observed in connection with the Rome Statute. Moreover, the *ratione temporis* rule would also have excluded the ICC's competence.

Under these circumstances, the European Union agreed with Kosovo about the establishment of a special tribunal called *Kosovo Special Chambers (KSC)*[121] the content of which was promulgated also by the Parliament of Kosovo.[122]

In addition to the trade with human organs, the formulation of the different other crimes follows rather closely the text of the Rome Statute, and the time frame is three years from 1998 to 2000. The construction of the judiciary is also based on the „hybrid" composition (national and international judges) and on the observation of Kosovar (and prior yugoslav) legislation and judicial practice. The budget is mostly covered by the European Union.

## 4. CONCLUSIONS AND REMARKS

It would be naive to expect that man will not commit crimes any more or that the pure establishement and the functioning of the International Criminal Court are in themselves sufficient for punishing all the perpetrators of war crimes or crimes against humanity.

The trials before the ICC contribute however to discourage potential perpetrators of these horrible crimes and make them realize that they can easily be brought to justice. Even their own state could conclude that solemn speeches about the determination of the national judiciary to punish militaries having committed war crimes are not enough if the results of the proceedings are not openly accessible to the public. The main philosophy behind complementarity is that beside the importance of the principle *ne bis in idem re*, the real solution

121 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2014.
122 Kosovo Specialist Chambers, Specialist Prosecutor's Office, 2015.

is to punish at national level, which is by the way an international legal commitment enshrined in several international conventions.

Today's young lawyers or young military officers may easily get directly involved in regional armed conflicts when participating in different peacekeeping or peace-creating missions close to or far from their own country. They can encounter difficult situations where different elements of multinational forces are fighting together when their home countries are not forcibly bound by the Rome Statute: the conflict between the obligation to obey the superior's order and the individual criminal responsibility for having committed a war crime is an issue that no soldier, whether sub-officer, officer or general, would ever like to experience.

The lawyer as a police or border guard officer or as a state attorney can easily meet in the near future a transmitted ICC warrant and the notification that according to some confidential information or of common knowledge, an alleged perpetrator is probably on the territory of the given state. Judges working on national level can meet such a litigation when the alleged perpetrator is contesting the legality of his arrest.

In order to be able to pass the right decision against or in favour, lawyers should be familiar with the basic rules of the Rome Statute and should also take into consideration that all these rules are continuously interpreted with a rather coherent judicial practice, which is however an evolutive jurisprudence like that of the other international tribunals.

This is by far not an easy job, but it is feasible and truly challenging for an ambitious lawyer, state administrator or attorney at law.

# CHAPTER II

# The "isms" or the International Criminal Court and its place in the international legal order – review of a quarter of century[123]

## I. INTRODUCTION AND EXPLANATION OF THE CHOSEN TITLE

When the conference organisers asked me to prepare an introductory study, I thought a lot about how to present the twenty-five-year history of the International Criminal Court. Logically, such a presentation can be based on the dichotomy of challenges and results, but this is a well-worn approach in analyses. When I chose the term "isms"—the meaning of which is not immediately clear—I remembered the title of a book that I saw in the window of a bookshop when I was a child: *Az Izmusok Története* (*History of the Isms*),[124] written by the Hungarian poet, painter, and left-wing activist, Lajos Kassák,[125] a member of the *avant-garde* movement. In this book, Kassák presents an overview of the great movements of the late nineteenth and early twentieth centuries, including impressionism, cubism, fauvism, futurism, constructivism, and dadaism. Although I did not understand the title at that time, it fascinated me.

123 This chapter is going to be published originally in: Béres, N. (ed.) (2024) *The ICC at 25: Lessons Learnt, Might Have Been Learnt and Unlearnt.* Miskolc - Budapest: Central Eurpopean Academic Publishing.
I thank Nóra Béres for her consent to the republishing.

124 Kassák, 1972.

125 Kassák Lajos

I hope that the late Kassák will pardon my borrowing this term from the title of his book to guide you through the twenty-five-year history of the International Criminal Court (ICC), framing it as a story where the main issues can be characterised by expressions ending in "ism".[126] I apologise to philosophers who use these expressions in other ways and to those who consider some of these "isms" as counter to the proper use of the English language.

## II. THE PAST TWENTY-FIVE YEARS THROUGH THE PRISM OF THE "ISMS"

### 1. Idealism vs. realism?

The notion of a permanent international criminal tribunal was long dismissed as idealist fantasy. As a consequence of the fate of the plans submitted by by Gustave Moynier[127],Vespasian Pella[128] and the *Association Internationale de Droit Pénal,*[129] non-entry into force of two related conventions[130] adopted under the auspices of the League of Nations in 1937, and failure to fulfil the promise stipulated in Article VI

126 Specifically, (1) Idealism vs. realism?; (2) Institutionalism (institution building, jurisprudence-building with "ICTY-ism" and "independentism"); (3) Parallelism (parallel use of common law and continental law approaches); (4) "Anti-Africanism" and 'legal neo-colonialism' (unsubstantiated charges and manipulative criticism); (5) "Out of Africanism" (reaction or logical consequences?); (6) Comparatism (or how to assess efficacy); (7) "Human rights" protectionism' (to protect the rights of the accused and to protect victims and witnesses); (8) Humanism (participation of victims and assistance and reparation for victims); (9) Activism vs. textualism; (10) Criminal law centrism and international law centrism; (11) Co-operationism (cooperation with states, international organisations and entities, and NGOs); (12) Criticism (internal critics, external critics, friendly and unfriendly); (13) Adaptationism; and (14) Futurism or "long termism"?

127 Moynier, 1872.

128 Pella, 1925.

129 Draft prepared by the International Association of Penal Law on adding a criminal chamber to the Permanent Court of International Justice (January 16, 1928).

130 Convention for the Prevention and Punishment of the Crime of Terrorism and Convention for the Creation of an International Criminal Court.

of the Convention on the Prevention and Punishment of the Crime of Genocide,[131] the world considered that such a tribunal was a noble but unrealistic pursuit, and only of interest to incurable idealists.

In 1989, the idea of establishing an international criminal court gained credence. Indeed, the initiative submitted by Trinidad and Tobago, renewed confidence of the International Law Commission that their work would receive the necessary attention and action, and developments of the Rome Diplomatic Conference and preparatory inter-governmental expert meetings signalled a decisive shift—a realisation that the work would succeed and that idealism had prevailed.

Many governmental experts were working hard to establish an institution entrusted with the task of putting an end to impunity.

However, as the old saying goes, "the devil is in the details".

Realism intertwined with "Realpolitik" did not disappear, significantly influencing the negotiations, including those on the triggering of the ICC's jurisdictional competence, the role attributed to the United Nations Security Council (UNSC), and the definition of aggression. Nobody was shocked by P5 members insisting on the role of UNSC as the third pillar in the determination of the ICC's jurisdictional competence, alongside *ratione loci* and *ratione personae* and in conjunction with the principle of *pacta tertiis nec nocent, nec pro sunt.*

The finalised form was vehemently criticised, raising concerns that (*i*) P5 members would never join the ICC and (*ii*) would not accept the prosecution of their nationals by the ICC, (*iii*) would do their best to send situations from Non-States Parties to the Prosecutor, and (*iv*) would prevent their allies from facing prosecution.

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131 United Nations Convention on the Prevention and Punishment of the Crime of Genocide:
Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Practice has proved these assumptions to be partly correct. While France and the United Kingdom joined the ICC, they have yet to sign the 2010 Kampala amendment on the definition of the aggression. Meanwhile, although the United States and Russia signed the Rome Statute, they later withdrew their signatures. The UNSC referred only two situations to the ICC, namely, those concerning Sudan and Libya, while likely vetoing or threatening to veto the referral of at least two other situations. Despite being a Non-State Party, Russia co-operated with the ICC for a while, including the first part of the preliminary examination of the situation in Georgia. Under Democrat presidents Barack Obama and Joe Biden, the US co-operated with the ICC concerning situations in Africa, Myanmar, and Ukraine. Neither the US nor Russia accepted the prosecution of their nationals before the ICC (e.g. Afghanistan and Ukraine) and the media have largely covered the different steps taken. Meanwhile, although the UK, as a State Party, accepted the preliminary examinations concerning British soldiers serving in Iraq, ICC action ended with the recognition of complementarity in respect to the British investigation and internal procedures over their own soldiers.

## 2. Institutionalism (institution building, jurisprudence -building with "ICTY-ism" and "independentism")

As always happens when a new judicial institution is set up, the first years of the ICC were spent preparing and adopting the necessary normative documents, namely, Elements of Crimes (2002) and the Rules of Procedure and Evidence (2002), both of which are complementary to the Rome Statute (1998). While the Rome Statute was adopted at the Rome Diplomatic Conference, Elements of Crimes and RPE were adopted during the first session of the Assembly of States Parties (ASP) during the first session, a few weeks after the Rome Statute was entered into force.

The Regulations of the Court were adopted by the judges on 26 May 2004, Regulations of Registry was approved by the Presidency of the ICC on 6 March 2006, and the Regulations of the Office of the Prosecutor was entered into force on 23 April 2009, after its adoption

by the Prosecutor. The Code of Professional Conduct for Counsel was adopted by the ASP on 2 December 2005. Some of these documents have undergone minor modifications since their entry into force.

Beside normative institution-building and its human staffing aspects, one of the main issues was whether and to what extent the experiences of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would be beneficial to the ICC. Pervasive during the first decade, this "*ICTY-ism*" was due to (*i*) the vocational similarity of the institutions, (*ii*) the similarity in the statutory texts, (*iii*) the developed jurisprudence, and (*iv*) the arrival of qualified experts from the ICTY staff.

Meanwhile, "*independentism*" can be explained by (*i*) the consideration that there are substantial organic and textual differences between the courts. For example, the ICTY had no "Pre-Trial Chamber" and some forms of individual criminal liability were presented at the ICTY as being of customary law in character. In particular, in the Rome Statute, Article 25(3)[132] and

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132 Rome Statute, Article 25 Individual criminal responsibility
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime;

Article 28[133] regulate the issue of liability similarly to the Joint Criminal Enterprise (JCE), which has even more complicated and criticised variants (JCE I, JCE II, JCE III), but in precise written form. Moreover, war crimes are formulated in a more detailed manner in the Rome Statute, embracing crimes with no equivalent in the ICTY Statute, and so on. (*ii*) With the emergence of the ICC's own jurisprudence, the jurisprudential reference to the ICTY and ICTR *dicta* is not necessarily inevitable. (*iii*) ICC judges and staff include diplomates and legal experts who were present at different stages of the preparation of the Rome Statute. Logically, their involvement in the negotiations and knowledge about the reasons for opting for a precise textual formula will influence their thoughts concerning the interpretation of a given disposition. (*iv*) The arrival of those who were not directly involved in

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133 Rome Statute, Article 28 Responsibility of commanders and other superiors
In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
2. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

either the ICTY or Rome Conference strengthened the need to develop a proper jurisprudence concerning cases that are factually different from those dealt with by the ICTY and ICTR.

## 3. Parallelism (parallel use of common law and continental law approaches)

The jurisprudential practice of the ICC is based on the parallel existence of the continental and common law approaches, although outside observers may get the impression that the latter prevails. During trials, *"Objection"* is often raised by the parties, and it is up to the presiding judge of the trial chamber to decide whether to sustain or overrule. Common law rules can also enter through the door opened by Article 21 (1)(c) via the general principles of law.[134] This occurred, albeit not without some hesitation, in the so-called *"no case to answer"* motion, which allows for the defence to stop the procedure as early as the "prosecution case" in the event of weakness of the Prosecutor's evidence. Although the *"no case to answer"* motion was declared compatible[135] with the framework of the Rome Statute, nevertheless, the

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134 Rome Statute, Article 21 Applicable law
1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

135 "39. Finally, the Chamber considers it appropriate to note that the decision to, in principle, allow 'no case to answer' motions is not intended to in any way pre-judge whether or not a motion of that kind should actually be pursued in this case. Bearing in mind that the purpose of permitting such motions is to promote the rights of an accused by providing a means to create a shorter, more focused and streamlined trial, the Defence should carefully consider - in light of the legal standard which will be applied, as specified above, and the evidence actually presented by the Prosecution at trial - whether or not a 'no case to answer' motion is warranted in the circumstances. Such motions should not

given chamber decides when and on what conditions it will admit such a submission.[136]

Another impact of common law can be observed in the more liberal approach vis-à-vis the individual opinions of judges, inserted into a judgement at different points and not necessarily in a distinct work appended to a common text approved by clear majority. [137]

Regarding the presence of continental law, consider the role played by the presiding judge during a trial, which is much stronger than that of a "tennis umpire" type judge of the Anglo-Saxon world and has the right to question the witness directly, reformulate the parties' questions, or reject their questions if they deem them repetitive or inappropriate (e.g. leading, insulting, or irrelevant). The institution of the pre-trial chamber

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be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented."
The Prosecutor v. Ruto and Sang; International Criminal Court, 2014c, § 39, p. 19.

136 "1. While the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.
2. The discretion of the Trial Chamber as to whether or not to conduct a 'no case to answer' procedure was not limited by internationally recognised human rights or as a result of the adoption of an adversarial trial structure."
International Criminal Court, 2017b, Key findings, §§ 1,2, p. 3.
See also: The Prosecutor v. Gbagbo and Blé Goudé, 2021a, ICC-02/11-01/15-1400 01-04-2021, §§ 5-7, p. 9.

137 See: '202. [...] The Appeals Chamber finds that the arguments made as to possible disagreements between the two majority judges do not affect the legal requirement for "one decision". This is because article 74(5) concerns a procedural formality in the requirement to issue one decision and does not relate to the substance of what is issued. The judges left no room for doubt in this case, stressing their full agreement with and support for the decision. The Appeals Chamber therefore rejects the Prosecutor's argument that the requirement to provide one decision was breached because 'Judge Henderson provided his own full and reasoned statement and made his own findings on the evidence while Judge Tarfusser only agreed in part, and afterwards, with his findings."'
The Prosecutor v. Gbagbo and Blé Goudé, 2021a, (referred supra) § 202, p. 89.

and its attributes vis-à-vis the Prosecutor bears similarities to those of the *juge d'instruction*, albeit without direct investigative competences.

While the importance of jurisprudential "precedents" is a characteristic phenomenon of common law, it is present in the European constitutional jurisprudence of continental law countries.

The fact that the pertinence of a given piece of evidence may only be assessed in the judgement and not an interlocutory decision reflects similarities to the continental law approach. Incidentally, as the "may" in the foregoing sentence indicates, the opposite approach is also compatible with the Rome Statute and the Rules of Procedure and Evidence The fact that evidence is formally submitted by parties is subject to the written decision of the given chamber.

In a trial, it is crucial (*i*) that the procedural issues not regulated in the Rules of Procedure and Evidence are clearly settled before the trial begins and (*ii*) that these "sub-rules" are observed throughout the trial. It goes without saying that the different trial chambers do not need to take a stance on whether to refer to the chosen rules and sub-rules of the trial as "common law" or of "continental law" rules.

Lastly, a number of the technical terms reflect common law terminology, including "calling party", "pre-trial brief", "appeal brief", "prosecutor's case", and "defence's case", among others.

## 4. "Anti-africanism", "legal neo-colonialism" (unsubstantiated charges, manipulative criticisms)

ICC practice[138] has often been criticised for alleged bias, "anti-Africanism", and "legal neo-colonialism", among a number of similar labels invented and attached to it with the thinly veiled objective of discrediting it. Such critiques note that the first situations referred to the Court were in Africa, with people at the top of the given national constitutional hierarchy "targeted" by the Prosecutor. The first arrest warrant concerned

138 As this chapter aims to provide a short introduction to the 22 year practice of the ICC and aid readers unfamiliar with the documentation system of the ICC, I do not refer to the adopted legal document but to the ICC press releases, which contain functioning hyperlinks to the given judgments, reports, and decisions. Exception is made where *verbatim* citation is necessary.

Mr. Omar el Bashir[139], the president of Sudan at the time. This was followed by the investigation of the Kenyan situation linked with large-scale post-electoral violence, which led to charges against the new head of state, Uhuru Muigai Kenyatta,[140] his deputy, William Samoei Ruto,[141] and some of their close collaborators. In Côte d'Ivoire, the resigned head of state, Mr Laurent Gbagbo,[142] his spouse,[143] and one of his ministers[144] were investigated, resulting in Gbagbo and his minister being transferred to The Hague, charged, and brought to trial. In the media, these cases were presented as a "proof" of alleged bias. The highly mediatised and manipulative image was reinforced by the fact that the indictees (or people under investigation) in other cases were also from Africa. (Indictees included, in alphabetical order, Al Hassan,[145] Al Mahdi,[146] Bemba,[147] Gaddafi,[148] Katanga,[149] Lubanga,[150] Ngudjulo,[151] Ntaganda,[152] Ongwen,[153] Yekatom, and Ngaïssona,[154] among others.)

The consecutive repetition of the pure legal fact that nearly all of these "situations" were referred to the ICC by the governments of the concerned states themselves, with the exception of the situations in Sudan and Libya, which were initiated by the UNSC. The only

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139 Al-Bashir Case. The Prosecutor v. Omar Hassan Ahmad Al Bashir
140 Kenyatta Case. The Prosecutor v. Uhuru Muigai Kenyatta
141 Ruto and Sang Case. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang
142 Gbagbo and Blé Goudé Case. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
143 Simone Gbagbo Case. The Prosecutor v. Simone Gbagbo
144 Gbagbo and Blé Goudé Case. The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
145 Al Hassan Case. The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud
146 Al Mahdi Case. The Prosecutor v. Ahmad Al Faqi Al Mahdi
147 Bemba Case. The Prosecutor v. Jean-Pierre Bemba Gombo
148 Gaddafi Case. The Prosecutor v. Saif Al-Islam Gaddafi
149 Katanga Case. The Prosecutor v. Germain Katanga
150 Lubanga Case. The Prosecutor v. Thomas Lubanga Dyilo
151 Ngudjolo Chui Case. The Prosecutor v. Mathieu Ngudjolo Chui
152 Ntaganda Case. The Prosecutor v. Bosco Ntaganda
153 Ongwen Case. The Prosecutor v. Dominic Ongwen
154 Yekatom and Ngaïssona Case. The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona

situation emanating from the *proprio motu* action of the Prosecutor was the Kenyan situation. However, this did not change the view of locally influential papers and journalists.

As a result of geographical proximity, the permeability of state boundaries, and the transboundary manoeuvring capacity of different military and paramilitary units, there was an undeniable overlap between armed actions and crimes perpetrated in the context of the situations in Sudan, Uganda, the Democratic Republic of Congo (DRC), and the Central African Republic. This fact did not prevent journalists and politicians from going ahead with their preconceptions.

Similarly, the official and public reference of the Office of the Prosecutor (OTP) on engaged preliminary examinations in the situation in Afghanistan (2007), Colombia (2006), Georgia (2008), and Honduras (2010),[155] which also appeared in numerous statements and press releases, did little to convince those who were interested in propagating these stereotypes.

Media close to the victims of these undeniable atrocities were more proactive in their following of the procedures, criticising the ICC for the length of the procedure and the eventual acquittals (or stay of proceedings) pronounced in the cases concerning Kenyan and Ivorian politicians. The "Demonstration Corner" beside the ICC compound was often used for gatherings calling on the ICC to take greater action against war crimes or crimes against humanity committed in Africa.

Several Member States pushed the African Union to convince the General Assembly of the United Nations (UNGA) to ask the International Court of Justice (ICJ) for an advisory opinion regarding the immunity of heads of states in international law with special regard to procedures before the ICC.[156] The UNGA has yet to seize the ICJ and it would appear that with the stay of proceedings (i.e. *de facto* acquittals) ordered in the Kenyatta, Ruto, Gbagbo, and Blé Goude cases, as well as Al Bashir's destitution and imprisonment in Sudan, African states no longer insist on the adoption of such a resolution.

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155 See e.g. International Criminal Court, Office of the Prosecutor, 2011 pp. 6, 9, 14, 18.

156 Pillai, 2018.

## 5. The "out of africanism" (reaction or logical consequences?)

As mentioned in the previous point, anti-Africanism is an unjust and unsubstantiated allegation. Nevertheless, it has undoubtedly had a significant impact on public opinion.

Although already present under the first prosecutor, Luis Moreno Ocampo, the enhanced attention paid to non-African situations became much more perceptible under his successors, Fatou Bensouda and Karim Khan. As a result of the advancement of analysis and steps taken in non-African countries and the emergence of new armed conflicts with all their inhumane consequences, the OTP's agenda concerning preliminary examinations[157]and investigations[158] came to include ten "situation countries" from other continents, while the nationality of the alleged perpetrators pointed to even more non-African states. New self-referrals have also been submitted.[159]

Certainly, in some "situations", the Prosecutor concluded that he/she would not open an investigation for reasons like lack of gravity (e.g. when the Israeli Navy used force to prevent the Mavi Marmara and other steamships from breaching the large, contested, and unilaterally imposed maritime blockade on the Mediterranean coast of the Gaza strip of of Palestine)[160] or on the basis of recognising the satisfaction of the criteria of complementarity (e.g. the preliminary examination concerning war crimes committed by British soldiers in Iraq[161] and the situation in Colombia[162].)

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157 In 2020: Bolivia, Colombia, Palestine, Iraq/UK, Philippines, Ukraine, Venezuela International Criminal Court, Office of the Prosecutor, 2020b, pp. 21, 24,27, 28, 45, 55, 59, 68.

158 Concerning regions outside Africa, in 2023, there were investigations of perpetrators in situations concerning Afghanistan, Georgia, Myanmar, Palestine, and the Philippines. See: ICC website under: Situations and cases. Available at: https://www.icc-cpi.int/

159 International Criminal Court, 2020c.

160 International Criminal Court, 2017a; International Criminal Court, 2020d; International Criminal Court, 2019b; International Criminal Court, 2015b.

161 International Criminal Court, Office of the Prosecutor, 2020a; International Criminal Court, 2020e.

162 International Criminal Court, 2021c; International Criminal Court, 2022b.

However, other preliminary examinations led to the opening an investigation, including the situations in Afganistan[163], the Bangladesh/Myanmar,[164] Georgia,[165] Palestine,[166], the Philippines,[167] Ukraine,[168] and Venezuela[169].

Despite the easy media accessibility of the ICC's press releases briefly explaining the actual issues, a large proportion of the African press continued to advance allegations concerning the ICC's "biased" approach and "legal colonialism". However, the purpose of continuing with other dockets is not to please the media, but to perform the ICC's legal duties in accordance with the statute.

## 6. Comparatism (or how to assess the efficacy?)

During the first two decades, the ICC received plenty of both professional and constructive criticism and unfriendly, politically-oriented criticism. Procedures were deemed lengthy, costly, and inefficient, and as targeting only low-level perpetrators and third world countries (i.e. 'cherry picking from the lowest branches of the tree'). The Court was also criticised for using "legal English" and "*français juridique*", language that can only be understood by academics and professionals of international criminal law.

What institution can the International Criminal Court be compared to in this respect?

Comparing the ICC to national criminal tribunals would be *ab ovo* incorrect for several reasons. (*i*) Generally speaking, national criminal

163 International Criminal Court, 2022c; International Criminal Court, 2021j; International Criminal Court, 2021k; International Criminal Court, 2020f; International Criminal Court, 2019c.

164 International Criminal Court, 2018a; International Criminal Court, 2019d.

165 International Criminal Court, 2016b; International Criminal Court, 2022d.

166 International Criminal Court, 2021d; International Criminal Court, 2021n; International Criminal Court 2021m.

167 International Criminal Court, 2021k; International Criminal Court, 2023a.

168 International Criminal Court, 2023b; International Criminal Court, 2023c; International Criminal Court, 2022f.

169 International Criminal Court, 2022g; International Criminal Court, 2022f; International Criminal Court, 2021o.

tribunals operate in different legal and factual circumstances, in co-operation with the national police, and already possess data and facts about similar crimes. (*ii*) Doing so would raise the question of which tribunals should be chosen and from which country. (*iii*) Choosing a tribunal from a "situation country" collide with the principle of complementarity. After all, the reason for the ICC's involvement is that the national prosecution did not function properly in respect to crimes falling under Article 5 of the Rome Statute in the given country. (*iv*) If we choose a tribunal in a state far from the conflict situations, what type of cases should be chosen for comparison? Simple cases, complicated cases, or only cases—if any—adjudicated on the basis of the exercise of universal jurisdiction, linked with facts that occurred far away, and in a state using another language? (*v*) If we choose the example of "small Nuremberg tribunals", that is, American military tribunals, it is not guaranteed that their jurisprudence would be as appreciated in all cases as that of the International Military Tribunal. Remember, for example, the case of Edmund Vesenmayer,[170] and charged with crimes against humanity, slavery, and membership to a criminal organisation. Although condemned to twenty years imprisonment in 1949, his sentence was subsequently reduced to ten years and he was released in 1951. In other words, he served only six years for masterminding the 1944 deportation of the Hungarian Jewry together with Adolf Eichman, knowing that the "Final Solution" meant their extermination.

Comparing the ICC to other international tribunals and courts would provide a different picture depending on the given international judicial institution. (*i*) Concerning their "objective" importance, of the many issues brought before the ICJ, only a few cases qualify. (*ii*) If we compare the ICC to regional human rights tribunals, other challenges emerge, such as the fact that procedures are rather lengthy. Consider the European Court of Human Rights (ECHR), which, a victim of its earlier success, is swamped by applications that cannot be adjudged as expeditiously as in the 1970s and 1980s. Although the experiences concerning the execution of ECHR judgments are generally highly favourable, some judgments have yet to be executed and some former Member States have denounced

170 Edmund Veesenmayer

the European Convention on Human Rights and left the Council of Europe (e.g. Greece between 1967 and 1974, and Russia in 2022).

Comparing the ICC's performance to that of other international criminal tribunals may be more appropriate, although several facts should be borne in mind, including (*i*) the special historical circumstances at the end of Second World War, the unconditional surrender of the Axis powers, the allied occupation of Germany and Japan, and so on. It is also worth considering (*ii*) the fact that the ICTY and ICTR examined cases in countries where international military intervention was needed for pacification; where the UNSC and the P5 were "surprisingly" unanimous in the necessity of executing the decisions; where the European Union could also exert influence on the Serbia, Croatia, Bosnia-Herzegovina to co-operate; where the situations under examination were interrelated; and where issues concerning translation and transcription were important, particularly in respect to the written form of the Serbian and Croatian languages using the Cyrillic or Latin alphabet. Even in the case of the ICTY, the capture and condemnation of those most responsible, namely, Radovan Karadžić and Ratko Mladić happened much later[171] than the original establishment of the ICTY in 1993 (Another top official was Slobodan Milošević, who was arrested in 2001, but died during his trial in 2006.)

Nevertheless, comparing the ICC and the ICTY and ICTR is a legitimate approach in terms of the legal reasoning and the similarity of the legal notions in their judgments and decisions.

While this might seem apologetic coming from me, the most useful approach is to compare the ICC to itself, taking into account how a prior judgment (or even an acquittal) can enhance the understanding and management of a new case related to the same situation. Examples include the Lubanga and Ntaganda cases and Katanga and Ngudjulo cases in the Ituri Province of the Democratic Republic of Congo; the Al Mahdi and Al Hassan cases in Mali; and the Bemba, Yekatom and Ngaïssona, Maxim Mokom, and Kani cases in the Central African Republic.

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171 Radovan Karadžić was arrested in 2008, and condemned at first instance in 2016 and at appeal in 2018. Ratko Mladić was arrested in 2011, and condemned at first instance in 2017 and at appeal in 2021.

## 7. 'Human rights' protectionism' (i. to protect the rights of the accused and ii. to protect victims and witnesses)

The protection of human rights is a *sine qua non* for courts and their judges, including the ICC. Criminal law procedures should be led with due respect to the fair trial principle, the precise sub-rules of which are enumerated in detail in the Rome Statute and related documents mentioned earlier, particularly the Rules of Procedure and Evidence.

Complementary is underpinned by the *ne bis idem principle* and the presumption of innocence has the same consequence as it does in national systems. If the pre-trial chamber is not convinced that the submitted evidence reaches the threshold of having *"substantial grounds to believe"* that the prosecutor's charges can be confirmed, the procedure cannot continue to trial. During the trial, if the prosecutor fails to prove *"beyond any reasonable doubt"* that the indictee has committed the crime with which they are charged, the judge cannot pronounce condemnation.

These rules are obvious to every lawyer.

The challenges facing the ICC were interrelated with issues concerning the collection of evidence, including a lack of genuine co-operation from states and security issues, where direct or indirect pressure was applied and witnesses disappeared, died, or significantly altered their testimony compared to their previous encounters with the OTP. Elapsed time, faded memory, error, or lack of attention when checking the reliability of witnesses in due course can contribute to a successful *"no case to answer"* motion, presented *supra*.

On the other side of the coin is the imperative to protect witnesses, who are often victims of the crimes charged. They should be protected from re-traumatisation and from potential social rejection and stigmatisation, such as in cases of forced marriage and childbearing.

Witness protection is justified when witnesses they are threatened by the accused's sympathisers acting for political or sometimes clan related reasons. Moreover, many witnesses are so-called "insiders" giving testimony against their former superior and thus often have a reasonable fear of retaliation.

As a consequence of the different witness protection measures, the "open trial" principle encounters difficulties in the gallery of the trial room and internet-based video transmissions due to the frequently ordered "private sessions" and the corresponding redactions in the publicly accessible transcripts.

## 8. Humanism (i. participation of victims and ii. assistance and reparation for victims)

As it is often emphasized, one of the novelties of the judicial system of the ICC is granting victims procedural status at an international level, namely, a *sui generis* status during pre-trial and trial proceedings and full party status during the reparation proceedings. Institutionalised participation in the pre-trial and trial phase, where the parties are the Prosecutor and the charged person assisted by his/her defence, involves the right to submit views, question witnesses, and call their own witnesses if needed. During the reparation procedure, the parties are the victims and the condemned person.

The ICC's victim-oriented approach is particularly overt in reparation and assistance proceedings. While the direct addressee of the reparation is the condemned person, it falls on the international community to provide financial help if the condemned is indigent, which is often the case. Here, the most important actors are the given trial chamber rendering reparation orders and the Trust Fund for Victims, which enjoys considerable statutory autonomy in managing the implementation of reparation and assistance. The latter can also reach those who were victims of the situation but not of the case (e.g. *inter alia* because the case has very concrete material, geographical, temporal, or personal parameters according to the confirmed charges and the sentencing judgment).

Despite their different legal nature, reparation and assistance are realised in a very similar manner in the field. They are primarily realised through medical, psychological, educational or professional training services, coupled with useful kits to launch small artisanal or agricultural businesses, and aid finding a job on the local labour market. The main challenge in this respect is the undeniable length of

the decision-making procedure and the budgetary considerations of the state, which limit its generosity.[172] It is worth noting that while the United Nations Educational, Scientific and Cultural Organisation (UNESCO) realised the reconstruction of the destroyed World Heritage historical monuments in Timbuktu within a short time, the fragility of the security situation in Mali hampers the revival of international tourism, which used to be the main source of the population's income.

## 9. Activism vs. textualism

Like other international tribunals and national constitutional courts, the jurisprudence of the ICC can be analysed using to the dichotomy of activism and textualism. It goes without saying that as an international tribunal, the ICC needs the support of States based on their understanding of and confidence in this organisation and its objectives. States will have difficulties understanding and trusting the ICC if the jurisprudence is contradictory, unclear, unsubstantiated, and cannot be calculated in advance with relative certainty.

However, the text of the Rome Statute is admittedly difficult to read. Varying interpretations may arise from the conjunction of different articles relatively far from one another or the position of a given disposition in the framework of an article having a special title sometimes used to refer to another issue altogether. This occurred *inter alia* in the case of Article 19(3), where the judges consented to the Prosecutor's interpretation of it as a possible preliminary ruling, although it is not necessarily related to a challenge, despite the title of the article.[173] In the "Myanmar decision", the Pre-Trial Chamber

172 Regarding aspects of the reparation see: The Trust Fund for Victims, 2021; The Trust Fund for Victims 2020; Rauxloh, 2021, pp. 203-222.; Brodney and Regué, 2018.; Brodney and Regué, 2019.; Kovács, 2018, pp. 100-124.

173 Rome Statute, Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case
(1) The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
(2) Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused

felt that the Prosecutor's question could be answered on another basis without making a decision about the interpretation of Article 19(3); however, in the "Palestine decision", it concluded that the submitted interpretation of the applicability of Article 19(3) was correct. The review of the jurisdictional competence in Article 19(1) is clearly the duty of the Court, regardless of whether there is no formal challenge, and Article 19(3) can be interpreted similarly. Moreover, neither paragraph contains the word "challenge".[174]

As noted, the *"no case to answer"* procedure was recognised by the Court as belonging to the general principles of law. The recognition of a special form of complicity (*"indirect co-perpetration"*) also resulted from a jurisprudential decision.[175]

On the other hand, the need for or ability of activism has been curbed by the scrupulous observation of fair trial guarantees, formulated according to the text of the International Covenant on Civil and Political Rights, wherein the delegations in Rome sought to reflect the common elements of their criminal procedural legal systems. Other key examples of textualism include the verbatim analogy of the different forms of genocide in the Rome Statute and Convention on the Prevention and Punishment of the Crime of Genocide (1948), the transposition of basic rules of the Geneva Conventions (1949), the development of the additional protocols (1977) with special regard to what these instruments qualify as "grave breaches" of international humanitarian law, and the transposition of core elements of different

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or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12.

(3) The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

174 See: International Criminal Court, 2018a; International Criminal Court, 2018b, pp. 10-15, §§ 26-33.; International Criminal Court, 2021m; International Criminal Court, 2021p, pp. 30-36, §§ 63-82.

175 On the history of the 'indirect co-perpetration' in the ICC jurisprudence, see, for example: Sliedregt, E., 2021.

conventions regarding crimes against humanity or the prohibition of some special types of weapons and methods of warfare. Adopted by the ASP, Elements of Crimes, an interpretative document enjoying a statutory priority[176] was conceived as means of ensuring governments that judges are limited in their sympathy towards activism.

As the institution of the amicus curiae is recognised in the Rules of Procedure and Evidence, several non-governmental organisations (NGOs) working in the field of human rights, having received permission to contribute, have been gently pushing the ICC chambers to be more open or to follow a certain type of jurisdictional interpretation as developed by other international tribunals. These proposals often suggest an enhanced activism on behalf of conservative judges.

## 10. Criminal law centrism and international law centrism

According to the Rome Statute, the ICC is both an international and a criminal court. This dual character is reflected in the composition of the judiciary.[177] While most of the day-to-day activities and decisions are related to criminal law, international law with all its problems

176 See the hierarchy in Article 21 of the Rome Statute (precited)!

177 Rome Statute, Article 36, Qualifications, nomination and election of judges
(a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
(b) Every candidate for election to the Court shall:
(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court; (...)
(4) For the purposes of the election, there shall be two lists of candidates:
List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and
List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).
A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall

emerges regularly. For example, international law was in focus in (*i*) the litigation on the legal basis of the effect of the arrest warrant against Omar Al Bashir on non-States-Parties, (*ii*) the situation in Myanmar, and (*iii*) the decision on the situation in Palestine.

In the series of decisions on the impact of the arrest warrant issued against Al Bashir, then the head of state of Sudan, a non-State Party to the Statute, two jurisprudential approaches explained the applicability of the arrest warrant despite the immunity of heads of states, a traditional rule of customary law. In order to resolve the *prima facie* conflict between Article 27[178] and Article 98[179] of the Rome Statute and find a harmonising interpretation, one of the pre-trial chambers issued the so-called "Malawi decision"[180] (followed by the "Chad decision"[181] the next day), well-substantiated

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be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

178 Rome Statute, Article 27, Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

179 Rome Statute, Article 98, Cooperation with respect to waiver of immunity and consent to surrender
1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

180 International Criminal Court, 2011a, ICC-02/05-01/09-139 12-12-2011, § 43, p. 20.
"43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."

181 International Criminal Court, 2011b, ICC-02/05-01/09-140-tENG 23-03-2012, §§ 13,14, pp. 7-8.

with jurisprudential references to the ICJ and international criminal tribunals of the twentieth century. The two decisions postulated the clear emergence of a customary law denying the existence of immunity when crimes against humanity and war crimes are alleged against the given person. However, in the "DRC decision", another pre-trial chamber emphasised the legal impact of the UNSC referral issued under Chapter VII of the UN Charter, which "implicitly lifted" Al Bashir's immunity.[182]

The Appeals Chamber had to deal with the problem of Al Bashir's arrest warrant vs. immunity in the Jordan appeal decision concerning another pre-trial chamber's decision, which also founded its argumentation on the impact of a UNSC resolution.[183] It decided in favour of the customary law approach[184], adding that

182 International Criminal Court, 2014b, ICC-02/05-01/09-195 09-04-2014, §§ 31,32, p. 15.
"31. Further, according to article 103 of the UN Charter "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the [...] Charter shall prevail". Considering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.
32. In view of the foregoing, the Chamber considers that the DRC not only disregarded the 2009 and 2010 Requests related to its obligation to cooperate in the arrest and surrender of Omar Al Bashir, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005).This course of action calls upon the SC and the Assembly of States Parties to take the necessary measures they deem appropriate."

183 International Criminal Court, 2017c, §§ 38–39, p. 15.

184 International Criminal Court, 2019e, Key findings, §§ 1,2, p. 5.
"1. There is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.
2. The absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court

the UNSC referring resolution duly considered the special rules of the Rome Statute.[185]

In case of Al Bashir, both approaches lead to the same conclusion, namely, immunity is not opposable. The Appeals Chamber's preference for the "customary law" approach is important because of the impact of the reasoning on situations where the referral does not come from the UNSC.

Important questions of public international law appeared in the decisions concerning the situation in Myanmar (the so-called "Rohingya-decisions"),[186] where one of the pre-trial chambers concluded on the objective legal personality of the ICC[187], closely following the

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to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction."

185 International Criminal Court, 2019e, Key findings, § 7, p. 5.
"7. Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise 'in accordance with [the] Statute'. This includes article 27(2), which provides that immunities are not a bar to the exercise of jurisdiction. As Sudan is obliged to 'cooperate fully' with the
Court, the effect of article 27(2) arises also in the horizontal relationship – Sudan cannot invoke Head of State immunity if a State Party is requested to arrest and surrender Mr Al-Bashir. Therefore, there was no Head of State immunity that Sudan could invoke in relation to Jordan, had the latter arrested Mr Al-Bashir on the basis of an arrest warrant issued by the Court. Accordingly, there was also no immunity that Jordan would have been required to 'disregard' by executing the Court's arrest warrant. And there was no need for a waiver by Sudan of Head of State immunity."

186 International Criminal Court, 2018a; International Criminal Court, 2019d.

187 International Criminal Court, 2018b, §§ 48,49, p. 29.
"48. In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.

ICJ's *dictum* in the advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations. It also emphasised that although Myanmar is not a State Party and the situation was not referred to the ICC by the UNSC, the ICC is competent because:

> [P]reconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.[188]

Consequently,

> [A]cts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold.[189]

The other pre-trial chamber gave the Prosecutor – acting *proprio motu* - the authorization to investigate.[190]

Highly complex international law questions were involved in the situation in Palestine[191], where the pre-trial chamber concluded by majority on the existence of its jurisdictional competence.[192] To this, I appended a dissent because I felt that the truly important international law parameters were not examined in the decision, and that their proper analysis would have led to the conclusion that the ICC had no jurisdictional competence in the matter. Examples of international

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49. Having said that, the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 4 and 15 of the Statute. (...) "

188 International Criminal Court, 2018b, § 64, p. 36.

189 International Criminal Court, 2018b, § 73, p. 42.

190 International Criminal Court, 2019f, § 125, p. 54, and p. 58.

191 International Criminal Court, 2021m.

192 International Criminal Court, 2021p.

law parameters that should have been examined include (*i*) the differences between a full state and a *nasciturus* state; (*ii*) the nature and constitutive elements of the "state-territory" and the "territory of a state"; (*iii*) the impact of unilateral and parallel commitments vis-à-vis the "Quartet" mediating between Israel and the Palestinians; (*iv*) differences between the value of resolutions if adopted by the General Assembly and if adopted by the UNSC, and whether according to Chapter VI or Chapter VII; and (*v*) the legal relevance of the Oslo agreements.[193]

## 11. Cooperationism (cooperation with states, international organizations & entities and non-governmental organizations)

As we tell our students at least once a week, international law is based on state co-operation. The The ICC also needs enhanced co-operation, with a special chapter of the Rome Statute (Part 9) devoted to this end. Articles 86–102 regulate the co-operation with States Parties and, if they are open to it, non-States Parties. Where co-operation is mandatory for States Parties, it is based on special agreement for non-States Parties.[194] As noted above, some form of co-operation with non-States Parties can be derived from a UNSC referral adopted under Chapter VII, mandatory *erga omnes*.

Co-operation can take multiple forms, including (*i*) the different forms of assistance and co-operation that The Netherlands, as a host State, grants the ICC on the basis of the *headquarters agreement;*[195] (*ii*) securitization of the ICC activity in the field;[196] (*iii*) judicial

193 Kovács, 2021.

194 Rome Statute, Article 87, Requests for cooperation: general provisions (...)
"5.The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council."

195 International Criminal Court, 2008a.

196 International Criminal Court, 2023d.

co-operation in the transmission of documents and information, particularly that involving teledata from phone- or internet-based contact managing companies; (*iv*) co-operation in some forensic matters;[197] (*v*) co-operation in the execution of arrest warrants; (*vi*) co-operation in tracing and freezing the assets of a person under arrest warrant; (*vii*) co-operation in witness protection;[198] (*viii*) co-operation concerning the admission of a condemned person from the ICC detention centre in Scheveningen to a national prison;[199] (*ix*) co-operation in the framework of the assessment of the complementarity criteria; (*x*) co-operation in the reparation and assistance to which victims are entitled;[200] and (*xi*) a special form of co-operation assisting States in building up or transforming their judicial system in order to be able to prosecute those responsible for crimes against humanity and war crimes.[201]

However, co-operation can be hindered by a number of factors. Problems can arise due to security issues in situation countries, which can affect the local functioning of the state administration (e.g. Afghanistan, DRC, and Mali). There is generally little to no co-operation when a "situation country" or State whose nationals may be potential perpetrators of crimes under investigation do not recognise the jurisdictional competence of the ICC. Co-operation may also cease after the ICC renders a decision considered unacceptable by the given country.

That said, refusal to co-operate and the issuing of sanctions concerning a given case does not necessarily exclude co-operation in other matters. Consider, for instance, the attitude of the US government under George W. Bush with what the media dubbed "The Hague Invasion Act"[202] and Donald Trump's sanctioning of Fatou Bensouda, the ICC

197 International Criminal Court, 2022h; International Criminal Court, 2022i; International Criminal Court, 2022j.

198 International Criminal Court, 2022k.

199 International Criminal Court, 2022l; International Criminal Court, 2022m; International Criminal Court, 2022n.

200 International Criminal Court, 2022o.

201 International Criminal Court, 2022b; International Criminal Court, Office of the Prosecutor, 2021b; International Criminal Court, 2022p.

202 Office of the Federal Register, National Archives and Records Administration, 2002; Bureau of Political-Military Affairs, 2003.

Prosecutor, and one of her collaborators.[203] In contrast, the US exhibited a highly co-operative attitude under Barack Obama and Joe Biden (who revoked Trump's sanctions[204]), as reflected in official statements.[205]

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203 U.S. President, 2020.

204 The executive order was revoked by Joe Biden. See: Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court, Press Statement, Anthony J. Blinken, Secretary of State, April 2, 2021, available at: https://2021-2025.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/ (Accessed: 1 July 2023).

205 *i.* U.S. Embassy in Israel, 2021.

*ii.* United States Mission to the United Nations, 2021.

"(...) As noted in the Court's report on developments between August 2020 and August 2021, this has been a year of significant change and activity at the Court. The United States would like to commend the ICC for a number of achievements in some of the longest-running situations before the Court – situations involving national governments that invited the ICC to act because they were unable to do so. (...)

We are pleased to have assisted in facilitating the voluntary surrender of Ongwen and the transfer of Ntaganda to the ICC. (...) Turning back to the ICC, we would also like to take note of the important effort underway relating to reform as the Court approaches its twentieth birthday. All organs of the Court and States Parties, working with other states, civil society, and victims, have engaged over the past year in consideration of a broad range of reforms, including those identified in the Independent Expert Review of the ICC.

Although, as this Assembly knows, the United States is not a State Party, we welcome these ongoing efforts to identify and implement reforms that will help the Court better achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. While we maintain our longstanding objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties absent a Security Council referral or the consent of the state, we believe that our concerns are best addressed through engagement with all stakeholders. Where domestic systems are unable or unwilling to genuinely pursue the justice that victims deserve, and that societies require to sustain peace, international courts such as the ICC can have a meaningful role. (...)"

*iii.* U.S. Embassy & Consulates in Italy, 2022

"Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma, March 21, 2022

(...) Efforts are moving forward, not only at the International Court of Justice, but also through the International Criminal Court and through the domestic courts of Argentina, in a case brought under universal jurisdiction.

The day will come when those responsible for these appalling acts will have to answer for them. (...)"

*iv.* S.Res.531 - 117th Congress, 2021-2022

„(...) the Senate—

Certainly, the US position is of broad interest to the international press.

(1) strongly condemns the ongoing violence, war crimes, crimes against humanity, and systematic human rights abuses continually being carried out by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;
(2) encourages member states to petition the ICC and the ICJ to authorize any and all pending investigations into war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;
(3) supports any investigation into war crimes, crimes against humanity, and systematic human rights abuses levied by President Vladimir Putin, the Russian Security Council, the Russian Armed Forces and their proxies, and President Putin's military commanders;
*v.* United Nations, 2022
8948th meeting, SC/14766, 17 January 2022
Briefing Security Council on Darfur, Prosecutor Urges Sudan Government Provide International Criminal Court Safe Access to Crime Scenes, Witnesses
"(...) Richard M. Mills, JR., (United States) said his country has participated in assemblies of State Parties to the Rome Statute as an observer and stands ready to engage with the Court to bring accountability to the most serious crimes. His delegation welcomes the strengthening of the Office of Prosecutor and the Court and the Prosecutor's position on prioritizing the Council's referral of Sudan to the Court. He also welcomed the Prosecutor's visit to Darfur in August and the appointment of a Special Adviser. (...)"
*vi.* United Sates Mission to the United Nations, 2022
Remarks at a UN Security Council Arria-Formula Meeting on Ensuring Accountability for Atrocities Committed by Russia in Ukraine. Ambassador Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice „(...) The United States is supporting a range of international investigations into atrocities in Ukraine. This includes those conducted by the International Criminal Court, the United Nations, and the Organization for Security and Cooperation in Europe. The United States welcomes the opening of the investigation by the ICC into atrocity crimes committed in Ukraine, and we intend to engage with all stakeholders to achieve our common objectives in ensuring justice. (...)"
*vii.* U.S. Deparment of State, 2022.
'Remarks by U.S. Ambassador Beth Van Schaack, OAS Committee on Juridical and Political Affairs
Technical Working Meeting to Strengthen Cooperation with the International Criminal Court, June 16, 2022'
„Over the past year and a half, the United States has worked hard to improve and reset our relationship with the ICC—through the lifting of sanctions that should never have been issued; a return to engagement with the Court and the Assembly of States Parties; and identifying specific areas where we can support ICC investigations and prosecutions, including steps to support the Court's work in Darfur and assistance on locating and apprehending ICC fugitives, including LRA leader Joseph Kony. We are looking to build on this

The US made an important point at the Summit for Democracy (2023), asserting that '[w]e acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law'.[206] Within the framework of the so-called G7, the US agreed to 'reiterate our commitment to holding those responsible to account consistent with international law, including by supporting the

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foundation and identify areas where the U.S. is well-positioned to help the Court succeed in carrying out its core mandate. Over the past year, there have been significant developments by the ICC in this hemisphere, marking a cooperative and collaborative relationship with states, and a welcome respect for the varied approaches by national authorities to deliver justice and accountability in a manner consistent with national law and their obligations under the Rome Statute."

*viii.* U.S. Department of Justice, Office of Public Affairs, 2023.
Readout of Attorney General Merrick B. Garland's Trip to Ukraine, March 3, 2023
„In addition, the United States became the first country to sign a memorandum of understanding (MOU) with the seven-member Joint Investigative Team (JIT) that is investigating Russian atrocities in Ukraine. The MOU, signed by the Attorney General, will facilitate the United States' cooperation and coordination with the JIT members as we collect evidence and investigate Russia's atrocity crimes. It also signals our resolve that Russia's invasion will not undermine our collective commitment to uphold human rights and preserve a free and democratic society."
(*Nota bene*: In the JIT, beside Ukraine, Poland, and Lithuania and Eurojust, the ICC is also a member.)

206 U.S. Deparment of State, 2023.
The full text of § 4 is as follows: „Fourth, support civilian control of the military and hold accountable those responsible for human rights violations and abuses, including those committed by non-state actors. We demand that all parties to armed conflict fully comply with their obligations under international humanitarian law including those regarding the protection of civilians, with particular consideration of populations in marginalized or vulnerable situations. We commit to fight against impunity and promote accountability for violations of international law, particularly genocide, war crimes, the crime of aggression and crimes against humanity, including where such crimes involve sexual and gender-based violence. We acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law."

efforts of international mechanisms, in particular the International Criminal Court'.[207]

Regarding international organisations, co-operation with the UN is pre-eminent. Such co-operation is founded on documents like *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* (2004),[208] which serves as the basis for a soft law paper entitled, *Best Practices Manual for United Nations—International Criminal Court Cooperation.*[209] The latter enumerates and hyperlinks to the memoranda of understanding contracted with some UN peacekeeping missions, such as those sent to the Democratic Republic of Congo,[210] in Côte d'Ivoire,[211] Mali,[212] and the Central African Republic.[213] There is also a framework agreement signed by the ICC and the United Nations Development Program[214].

Enhanced co-operation has been established with two intergovernmental police organisations, namely, Interpol[215] and

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207 Ministry for Europe and Foreign Affairs, 2023.
See: „II. Promoting peace and security
1. Russia's war of aggression against Ukraine „(...) There can be no impunity for war crimes and other atrocities such as Russia's attacks against civilians and critical civilian infrastructure. We further condemn the unlawful transfer and deportation of Ukrainians, including children, and conflict-related sexual violence against Ukrainians. We reiterate our commitment to holding those responsible to account consistent with international law, including by supporting the efforts of international mechanisms, in particular the International Criminal Court. We support exploring the creation of an internationalized tribunal based in Ukraine's judicial system to prosecute the crime of aggression against Ukraine. In addition, we underscore the importance of the protection and preservation of Ukrainian cultural properties and heritage damaged and threatened by the war of aggression. (...)"

208 United Nations, Office of Legal Affairs, 2004a.

209 United Nations, Office of Legal Affairs, 2004b.

210 International Criminal Court, Office of the Prosecutor, 2008.

211 United Nations, Office of Legal Affairs, 2020.

212 United Nations, Office of Legal Affairs, 2021.

213 United Nations, Office of Legal Affairs, 2021.

214 United Nations, Development Programme, 2022.

215 International Criminal Court, 2004; Interpol cooperation agreements, available at: https://www.interpol.int/Who-we-are/Legal-framework/Cooperation-agreements/Cooperation-agreements-Global-international-organizations (Accessed: July 1, 2023).

Europol,[216] which work together with the European Union Agency for Criminal Justice Cooperation (Eurojust).[217] There ICC also has a co-operation and assistance agreement with the European Union (EU).[218] As a fervent promoter of the fight against impunity, the EU is also very active in the framework of the Common Foreign and Security Policy and of Police and Judicial Co-operation in Criminal Matters (PJCCM), the former Justice and Home Affairs (JHA) Council.[219]

The ICC also has a formalised relationship with the International Commission on Missing Persons.[220]

The International Committee of the Red Cross (ICRC), a legally non-intergovernmental organisation that plays a special role in armed conflicts and related matters, entered into a contractual relationship with the ICC through the Agreement on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court.[221] The ICRC also contributes to the analysis and outreach of issues and activities under the purview of the ICC.[222]

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216 European Union Agency for Criminal Justice Cooperation, 2022a; European Union Agency for Criminal Justice Cooperation, 2022b; Europol, 2023; International Criminal Court, 2023e.

217 European Union Agency for Criminal Justice Cooperation, 2022c; International Criminal Court, 2022r; European Union Agency for Criminal Justice Cooperation, 2022b.

218 International Criminal Court, 2006.

219 See on this in detail: Kovács, 2020, pp. 311-326.

220 International Criminal Court, Office of the Prosecutor, 2016c.

221 International Criminal Court, 2006b.

222 International Committee of the Red Cross, 2010.
The IRCR provides a number os useful resources. See, for example: 'Cooperation in extradition and judicial assistance in criminal matters – Factsheet'; 'International criminal justice: The institutions – Factsheet'; 'War crimes under the Rome Statute of the International Criminal Court and their source in international humanitarian law – Table'; 'International Criminal Court; Issues raised regarding the Rome Statute of the ICC by national Constitutional Courts, Supreme Courts and Councils of State'; 'ICRC and ICC: two separate but complementary approaches to ensuring respect for international humanitarian law'; 'Aspects of victim participation in the proceedings of the International Criminal Court'; 'Transitional justice and the International Criminal Court – in "the interests of justice"?'; 'The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?'

Finally, the ICC has various relationships with different NGOs and civil societies. The umbrella organisation known as the *Coalition for the International Criminal Court*[223] embraces dozens of NGOs ready to promote the ICC's aims. Several of these organisations participated in the side events of the Rome Diplomatic Conference and the sessions of the ASP. Some NGOs or their leaders stepped up as *amici curie* during various trial and pre-trial affairs or served as legal counsels or representatives of victims. Some pro-NGO lawyers are currently acting on the side of the defence in a given case, which is the correct thing to do. Co-operation with NGOs, whether international or national, primarily manifests in the outreach of the ICC, where they facilitate the understanding of local situations, access to victims and potential witnesses, as well as reparation and assistance matters. Some have scholarly ambitions and provide analytical, critical, or easily understandable local coverage about the practices of the ICC.

## 12. Criticism (internal critics, external critics, friendly and unfriendly)

'Nothing is perfect', Saint-Exupéry's fox told the Petit Prince. This is particularly true of international law in general and the ICC in particular. Like all human creations, no international tribunal or international jurisprudence can be perfect and are subject to criticism.

Internal criticism takes the form of separate and dissenting opinions, quashing of appeal, or a new jurisprudential approach. The latter generally avoids openly criticising the previously followed line, instead emphasising the need to "*distinguish*" between the factual or legal context of the given decision. For example, consider the reparation decisions in the Lubanga, Katanga, Al Mahdi, and Ntaganada cases.[224] This form of internal criticism can also be observed in the issue of how precise a confirmation of charges decision should be, such as

223 https://www.coalitionfortheicc.org/ (Accessed: 1 July 1 2023).

224 International Criminal Court, 2015c; International Criminal Court, 2019g; International Criminal Court, 2018d; International Criminal Court, 2018c; International Criminal Court, 2022r.

in the Bemba appeal, Ntaganda appeal, and intermediary appeal decision in the Yekatom and Ngaïssona case, for example.[225]

A special form of internal criticism may come from the ASP, which can call the judiciary and OTP to accelerate and get rid of alleged unnecessary elements during the procedure and in the decisions or submissions. A good example of this is the Independent Expert Review,[226] commissioned by the Assembly of the States Parties,[227] which took stock and proposed suggestions to the OTP, the Registry, and the Judiciary, respectively. The ICC is currently exploring how to realise suggestions, which were largely formulated on the assumption that States are not ready to amend or change the text of the Statute. As such, it is the practice that should be modified if necessary, alongside small changes to the Rules of Procedure and Evidence and other non-statutory documents.

External criticism can be bipartite or hostile. Regardless, such criticism can be scholarly in nature or superficial and politically motivated.

Authors in both States Parties and non-States Parties have provided comprehensive and professional analyses. Those who are or were involved in conflictual situations in as NGO-affiliated persons, legal counsel, or governmental experts cover the different phases of an ICC proceeding according to the opinion of the represented or favoured side. However, the quality of articles or reports in printed and audio-visual media is very different, even within a given state, and pro-oppositional or pro-governmental media often give diametrically opposing pictures of the ICC.

In general, criticism is to be followed and understood, at least in order to realise where and how the ICC's outreach activity should be amplified or changed, if truly necessary.

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225 International Criminal Court, 2018d, §§ 110, 115, pp. 38-39., 41-42.; International Criminal Court, 2021q, 3§§ 327-327, pp. 107-109.; International Criminal Court, 2021r, §§ 39,44, 54, pp. 16, 20, 25.

226 International Criminal Court, Assembly of States Parties to the Rome Statute, 2020.

227 International Criminal Court, Assembly of States Parties to the Rome Statute, 2019.

## 13. Adaptationism

The Rome Statute contains three lengthy articles concerning different forms of eventual amendments[228]. In spite of the adoption of the definition of aggression at the Kampala Conference as well as amendments concerning the criminalisation and punishment of certain weapons and means of warfare, most of the States Parties to the Rome Statute appear to feel that no minor, major, or comprehensive review is appropriate at present. There is an impression that negotiations resulting from such reviews could open Pandora's box, potentially reducing the number of States Parties and diminishing the strength of the ICC.

This means that the necessary adaptation in answer to the experienced challenges will not be done through conventional, statutory revision, but via the modification of the legal and sometimes metalegal soft law instruments. This will be achieved through resolutions passed by the ASP[229] or by the decisions of the judiciary.

The Independent Expert Review proposed partly technical, partly procedural reforms that do not require modification to the treaty law of the Rome Statute. Such reforms have been realised in the past, including the Rules of Procedure and Evidence[230] where *Rule 68 on*

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228 Rome Statute, Article 121 Amendments, Article 122 Amendments to provisions of an institutional nature and Article 123 Review of the Statute

229 See, for example, minor reforms as to electoral matters:
*i.* International Criminal Court, Assembly of States Parties to the Rome Statute, 2023a.
*ii.* International Criminal Court, Assembly of States Parties to the Rome Statute, 2023b.
*iii.* International Criminal Court, Assembly of States Parties to the Rome Statute, 2022
As to the review:
*i.* International Criminal Court, Assembly of States Parties to the Rome Statute, 2020b.
*ii.* International Criminal Court, Assembly of States Parties to the Rome Statute, 2021.
For the Working Group on Amendments see: https://asp.icc-cpi.int/WGA (Accessed: 1 July 2023);
Finally, regarding experiences of and problems surrounding complementarity, see: https://asp.icc-cpi.int/complementarity (Accessed: 1 July 2023).

230 International Criminal Court, 2023f.

*Prior Recorded Testimony* was expanded to cope with challenges, such as cases where witnesses—presumably under duress or threat—refused to testify or were unable to recall what they had told the OTP previously. News about witnesses killed in road accidents or mysteriously disappearing also contributed to the unwillingness to be heard by judges. The ASP significantly amended the Rules of Procedure and Evidence, but emphasised the importance of the threat, the interest of justice, and the condition that 'the prior recorded testimony has sufficient indicia of reliability'.

The *Chambers Practice Manual*[231] is a non-binding tool intended to facilitate a coherent and transparent jurisprudence. In 2015, the Pre-Trial Division prepared a Manual[232] based on the "best practices approach", placing emphasis on different procedural time limits and suggesting a structure of different decisions, particularly those concerning the confirmation of charges. It was subsequently amended with a chapter concerning Trial chambers, and the first version of the Chambers Practice Manual was published in 2016. Since then, several addenda and changes have been introduced. The sixth version is currently applied.

The Manual, which is non-binding in nature, is generally considered a useful instrument, especially for trial lawyers working on actual cases and situations within the ICC. It is only adopted by the judiciary—that is, the common session comprising all the eighteen judges—without the need for the consent of the ASP.

It is important to mention a special institution called the Advisory Committee on Legal Texts[233] (ACLT which consists of (*i*) three judges, representing the three different judicial divisions; (*ii*) the representatives of the defence counsels; (*iii*) a senior lawyer or head of the Legal Coordination Section of the OTP and a high-ranking representative of the Registry. This body is entrusted with the technical preparation and prior analysis of the harmony of draft reforms, whether they are adopted by the judges alone (e.g. the Manual and the Regulations of

231 Chambers Practice Manual, see: https://www.icc-cpi.int/about/judicial-divisions/chambers-practice-manual , (Accessed: July 1, 2023)

232 International Crminal Court, 2015d.

233 International Criminal Court, 2022s.

the Court) or require an ASP decision according to the Rome Statute (e.g. Rules of Procedure and Evidence).

## 14. Futurism or "long termism"?

Is the creation of the ICC futuristic? In the previous points, I noted a good number of statutory, structural, and procedural factors that serve the aim of "putting an end to impunity", through which creators and judicial managers—whether judges, internal advisors or prosecutors—endeavour to realise the purpose and expectations of the ICC.

However, it is not possible to fully satisfy expectations.

Using the ICJ as an analogy, the ICJ has not become the unavoidable dispute setting forum of interstate litigation. It is often said that mainly small or relatively weak states have brought their cases before the ICJ, while great powers have tended to neglect it or tried to avoid its jurisdictional competences through the wisely formulated sub-conditions of their unilateral declarations recognising the jurisdiction of the Court as compulsory. Nevertheless, even the greatest countries are occasionally litigants and the ICJ has pronounced judgments obliging them to act in conformity with international law commitments. However, the main and incontestable output of the ICJ is their role in the uniform interpretation of international law in university teaching and scholarly analysis, which helps governments act accordingly.

Something similar can be said about the ICC.

The jurisprudence regarding international criminal law as developed by the international military tribunals of Nuremberg and Tokyo, the ICTY and ICTR, the hybrid tribunals, and the ICC has been integrated into the curriculum of law faculties and military and police academies. Even if they result in a relatively low number of investigated, charged, and finally condemned people, the ICC's activities and selection of cases demonstrate how national prosecution could act in time to prevent atrocities and, should they occur, how to investigate and punish the perpetrators and secure reparation and assistance to the victims.

States were absolutely right when they decided on its establishment and despite the difficulties and challenges it faces, the ICC will

fulfil its mandate. The ICC is the long-term realisation of a common aim, the pursuit of which does not preclude necessary continuous adaptation through reforms and amendments formulated following careful review.

The ICC is serving the present and the future. It is not futuristic, it is realistic. It is equipped with high level technical facilities, which is not only useful in its day-to-day work but also helps the outside world, national ministries, the judiciary, academia, law firms, and the media in keeping apprised of and following its work. The transparency of judicial cases at the pre-trial and trial level facilitates the understanding of the functioning of the ICC and its institutions. It serves the long-term interests of mankind.

## III. CONCLUSIONS

As the recently-deceased Benjamin Ferencz[234] said in the Hague,

> The ICC, as the court of last resort in a state-dependent system of international justice, offers hope to many who have no hope that their voices will be heard – that they have not been forgotten, and that they are not alone." (...)"protection of human rights demands deterrence of human wrongs, and all nations should strongly support the Court's efforts in helping to end impunity for crimes of the gravest concern to all humankind."(...)"Now approaching my 102nd year, I have cherished the goals for which the ICC stands throughout my entire adult life and I give thanks for the torch-bearers who will carry the dream of a more humane world under the rule of law forward, lest we perish from the folly of our failure to do so.[235]

It would be difficult to find a better way to express how the interrelationship between endeavours, challenges, state obligations, and so many individuals' devoted professional work characterises the ICC, which is sailing not between Scylla and Charybdis, but between aims and realities.

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234 International Criminal Court, 2023g.
235 International Criminal Court, 2020g.

# CHAPTER III

# On the specificities of the international legal personality of the International Criminal Court[236]

## 1. INTRODUCTION

Around the twentieth anniversary of the adoption of the Rome Statute, it is worth examining once again the specificities of the international legal personality of the International Criminal Court even if this issue is not in the forefront of the public attention.

Needless to say that the Court has met challenges and difficulties; some of them were resolved but a number of the elaborated solutions generated nolens-volens new problems and new challenges. Some of these challenges feed back partly to changes in the policy of some states and organs and the classical cost and benefit analysis can always be evoked by those who would like to hide their own responsibilities for the emergence of current problems. Other challenges are due to the conflict between the expectations of 1998 and the difficulties met on the spot by the staff of the Prosecutor as well as the peculiarities of the engaged lawsuits before the different chambers.

However, I do not want to enter hereby in the analysis of these challenges and the answers given to them. I will focus only on the

236 This chapter was published originally in Szabó, M. (ed.) (2018) *Hungarian Yearbook of International law and European Law, Vol. 6.* The Hague: Eleven International Publ., pp. 225-243. https://www.hungarianyearbook.com/download.php?f=MDcwOSM1OSMy (Accessed: July 1, 2024)
I thank editor-in-chief Marcel Szabó for his consent to the republishing.

character of the international legal personality of the ICC because this issue underlies several challenges, political debates and states' actions on behalf of states whether they admit it or not.

## 2. THE CLASSICAL STARTING POINT: THE LEGACY OF THE BERNADOTTE DICTUM

When the international legal personality of international organizations is concerned the question is often evoked whether the jurisprudence on the criteria of the objective legal personality of the International Court of Justice is transposable or is not. We all know however that in the doctrine, the majority position seems to back that up till now only the United Nations can be considered as enjoying this character due to the will of the states as proclaimed solemnly by the International Court of Justice.

I recall the famous formulation pronounced by the ICJ in the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (the "*Bernadotte* case"):

"Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, *the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone*, together with capacity to bring international claims."[237]

The expression "fifty States, representing the vast majority of the members of the international community" ought to be read according to the 1945 *ratio*, which was 50 : cca. 72.[238]

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237 ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, p. 185 (emphasis added).

238 These States are: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba,

Three main doctrinal approaches have been developed since then on the eventual applicability of the criteria set out by the ICJ with regard to international legal organizations (or entities) other than the United Nations (the "UN") and, in particular, the ICC. There is an affirmative approach (either *expressis verbis* or *per analogiem* to the scholar's affirmative standpoint on the alleged objective legal personality of international organizations in general)[239], a denying[240] and a hesitating one (i.e. the question can be decided only on the basis of the practice of the ICC and States, especially the actual practice in the relationship between the ICC and non-States Parties.)[241], but we may note their common root in the wording of the ICJ *dictum*.

We must not forget that the main legacy of the above mentioned ICJ *dictum* is – besides the recognition of a *locus standi* for the UN for reparations of harms caused to its functionaries and agents – the judicial confirmation of the competence of the UN (Security Council) in

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Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic , Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela and Yugoslavia. The defeated European axis countries – Germany, Hungary, Romania, Bulgaria and Finland – as well as Japan were of course absent. Some neutral countries were also missing: e.g. Switzerland, Sweden, Spain, Portugal, Ireland, Iceland and Afghanistan. Some countries were under reconstruction from Axis yoke: Austria, Albania, etc.

239 For this approach, *see e.g.*: Pellet, 1997a, p. 78.; Pellet, 2002, p. 147.; Pellet, 1997b, pp. 1080-1081, pp. 1082-1083.; Crawford, 2014, § 247-248, p. 201-202; Danilenko, 2002, p. 1873.; Danilenko, 2000, pp. 450-451.; Gallant, 2003, p. 557.; Cryer, 2015, p. 261.; Orentlicher, 1999, p. 490.; Lüder, 2002, p. 82, p. 91.; Reisman, 2012, p. 226: "[...] the Statute of the International Criminal Court represented a *collective decision by the member States of the United Nations against* a universal jurisdiction for national courts, reposing contingent criminal jurisdiction in an international jurisdiction." (emphasis added).; Quast Mertsch, 2012, p. 155.; Boyle and Chinkin, 2007, p. 240-241.

240 For the second approach, *see e.g.*: Rückert, 2016, p. 105.; Cahin, 2012, p. 356., pp. 358-359.; Svaček, 2013, p. 10.

241 For the third approach, *see e.g.*: Engström, 2002; Martines, 2002, p. 207., pp. 210-211., p. p. 216.; David, 2005, p. 359, p. 364, p. 368.

case of threat to peace and security, competence which extends also to non-Member States of the UN.

It is also important to see the similarities as well as the differences between the creation and vocation of the UN and those of the Court as reflected in the UN Charter and the Statute of the Court, respectively. It is worth noting that the Statute was adopted on 17 July 1998 by a vote of 120 to 7, with 21 countries abstaining. At the time, the number of UN Member States was 185 (as of 2011, there are 193 UN Member States).

I think that it would be easy to paraphrase the Bernadotte-formula to the International Criminal Court as such:

*On this point, the Chamber's opinion is that more than one hundred and twenty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the International Criminal Court, possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions.*

## 3. STATES' POSITIONS IN AN AROUND 1998 CONCERNING THE NECESSITY OF AN (OR THE) INTERNATIONAL CRIMINAL COURT

It is equally clear however that the borrowing of the formula and its transposition are in themselves not enough if the thesis cannot be substantiated by adequate reasoning based on the states' attitude and standpoints on and around the famous day of July 17th-1998 and also later. From this point of view my attention is focused on the statements of those who voted against or (by the way maybe and/or) up till now have not become a state party to the Rome Statute. (It is however known that formally, the vote was a secret (not nominative) vote and states were not obliged to reveal the motivation of their vote cast. There is however an unofficial scholarly consensus on the list of states having abstained from the vote and states having voted against. Let's point out first and foremost that abstaining or voting

against were equally legitimate, based on the state's sovereignty and as we shall see *infra* even the negative position could support the idea while criticizing some elements of the chosen mechanism. It is useful to study the pronounced or circulated official declarations in order to remember and understand the reasoning and the consequences. Hereby, I beg for the reader's forgiveness for citing some of these declarations lengthily (or *in extenso*) in the footnotes without using the traditional technique of cutting the less relevant parts. What is less important for some, could be very important for another, and in this way, the charge of manipulation or simplification can also be avoided.

Even the States which cast a negative vote on the adoption of the Statute were acting during the Rome Diplomatic Conference – as well as prior or after in the PrepCom – as fervent promoters of the establishment of the ICC. Among the reasons for their eventual negative votes were alleged flaws, missing crimes or certain formulations which, to them, seemed not appropriate or not precise enough. Two of them, namely the United States[242] and

242 President William J. Clinton's Statement on the Rome Treaty on the International Criminal Court, 31 December 2000: "The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000, deadline established in the treaty. *We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.*

Under the Rome Treaty, the International Criminal Court (ICC) will come into being with the ratification of 60 governments and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity, and genocide. The treaty requires that the ICC not supersede or interfere with functioning national judicial systems; that is, the ICC prosecutor is authorized to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national. The U.S. delegation to the Rome Conference worked hard to achieve these limitations, which we believe are essential to the international credibility and success of the ICC.

In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have

Israel,[243] later became signatory States, although the US withdrew

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ratified the treaty but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not.

Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the court's jurisdiction.

But more must be done. Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty. The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.

Nonetheless, signature is the right action to take at this point. *I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide* and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead." (Emphasis added). Available at: http://www.presidency.ucsb.edu/ws/?pid=64170 (Accessed at: 1 July 2023).

243 See: Israel's Declaration upon signature, United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18 (Accessed: 1 July 2023)https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18%20:

"*Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the Rome Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.*

As one of the originators of the concept of an International Criminal Court, Israel, through its prominent lawyers and statesmen, has, since the early 1950's, actively participated in all stages of the formation of such a court. Its representatives, carrying in both heart and mind collective, and sometimes personal, memories of the holocaust - the greatest and most heinous crime to have been committed in the history of mankind - enthusiastically, with a sense of acute sincerity and seriousness, contributed to all stages of the preparation of the Statute. Responsibly, possessing the same sense of mission, they currently support the work of the ICC Preparatory Commission.

At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political

its signature shortly after[244] and Israel also expressed her decision[245] not to ratify the Statute.

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agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool. Today, in the same spirit, the Government of the State of Israel signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The Government of Israel hopes that Israel's expressions of concern of any such attempt would be recorded in history as a warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole.

Nevertheless, as a democratic society, Israel has been conducting ongoing political, pand academic debates concerning the ICC and its significance in the context of international law and the international community. The Court's essentiality - as a vital means of ensuring that criminals who commit genuinely heinous crimes will be duly brought to justice, while other potential offenders of the fundamental principles of humanity and the dictates of public conscience will be properly deterred - has never seized to guide us. Israel's signature of the Rome Statute will, therefore, enable it to morally identify with this basic idea, underlying the establishment of the Court.

Today, [the Government of Israel is] honoured to express [its] sincere hopes that the Court, guided by the cardinal judicial principles of objectivity and universality, will indeed serve its noble and meritorious objectives." (emphasis in the original).

244 *See further,* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18 (Accessed at: 1 July 2023):

"In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: 'This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

245 United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18 (Accessed at: 1 July 2023):

"In a communication received on 28 August 2002, the Government of Israel informed the Secretary-General of the following: "(...) in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

Russia also signed the Statute, but withdrew its signature in 2016.[246] China did not sign the Statute[247] and India expressed great

246 Statement by the Russian Foreign Ministry, 16 November 2016:
"On November 16, the President of the Russian Federation signed the Decree "On the intention not to become a party to the Rome Statute of the International Criminal Court". The notification will be delivered to the Depository shortly.
Russia has been consistently advocating prosecuting those responsible for the most serious international crimes. Our country was at the origins of the Nuremberg and Tokyo tribunals, participated in the development of the basic documents on the fight against genocide, crimes against humanity and war crimes. These were the reasons why Russia voted for the adoption of the Rome Statute and signed it on September 13, 2000.
The ICC as the first permanent body of international criminal justice inspired high hopes of the international community in the fight against impunity in the context of common efforts to maintain international peace and security, to settle ongoing conflicts and to prevent new tensions.
Unfortunately the Court failed to meet the expectations to become a truly independent, authoritative international tribunal. The work of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council. It is worth noting that during the 14 years of the Court's work it passed only four sentences having spent over a billion dollars. [...]"
Available at: http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566 (Accessed at: 1 July 2023).
*See further.* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18 (Accessed at: 1 July 2023):
"In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969."

247 Ministry of Foreign Affairs of the People's Republic of China, China and the International Criminal Court, 28 October 2003:
"[...] The Chinese Government consistently understands and supports the establishment of an independent, impartial, effective and universal international criminal court. If the operation of the court can really make the individuals who perpetrate the gravest crimes receive due punishment, this will not only help people to establish confidence in the international

concerns at the opening of the Rome Diplomatic Conference *vis-à-vis* the planned procedures and mechanisms, but not towards the idea of the establishment of the ICC as such.[248] At the opening of the Conference, Iran's position was also in favour of the establishment of the ICC,[249] notwithstanding the fact that the Iranian representative

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community, but also will be conducive to international peace and security at long last. It was precisely based on this stand and understanding that the Chinese Government took an active part in the process of negotiations on the Rome Statute. What was regrettable was that because some articles of the text of the statute agreed by Rome Conference could not satisfy some reasonable concern of the Chinese Government, the participating Chinese Delegation had to vote against the statute when it was adopted. This was also the reason why China could not sign the Rome Statute." Available at: http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml (Accessed at: 1 July 2023).

248 The representative of India first enumerated India's points of criticism, for example, with regard to the referral mechanism of the Security Council, the Prosecutor's *proprio motu* power to initiate investigations, the fact that some crimes were missing and others were formulated not on the basis of customary law, but progressive development, or according to the text of multilateral treaties which did not enjoy universal acceptance, and the concern that the practice of the *ad hoc* tribunals would be transposed to the ICC, where it was not appropriate. The representative then concluded:
"Mr. President, the Conference must address all these matters of substance which are critical to the establishment of the International Criminal Court. A purist approach reflecting a particular group position alone would not be adequate. The international community does not have to repeat the past mistakes as seen in the attempts to pursue narrow national agendas on human rights matters in various UN human rights fora. Instead, the best way to find solutions to these problems lies in recognising genuine diversity, and striving for a broad based Statute capable of wide acceptance and participation by States. Despite the odds, this is a course worth pursuing for all those committed to the basic objectives of establishing an universal international criminal court. My delegation assures you of our support in such an endeavour." (Emphasis added); 'Statement by Mr Dilip Lahiri Additional Secretary (UN) Ministry of External Affairs Head of the Indian Delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' 17 June 1998. Available at: https://www.legal-tools.org/doc/ebc5e9/pdf (Acessed: 1 July 2023).
*See also* an article by Mr. Lahiri, written in 2010 already in a personal capacity and examining the pros and cons of an eventual change in India's policy towards the ICC where he is advocating for a signature.

249 'Statement by H.E. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran', 17 June 1998. Available at: https://www.legal-tools.org/

enumerated a number of items in relation to which his Government wished to see substantive changes.[250] (Iran's signature has not yet been followed by ratification.)

I am certainly not in a position to qualify the decisions or reasons of these State; I would rather highlight that while these States criticized certain formulations, competences or practices, in the period between 1998-2002, they fully recognized the necessity of an international criminal court and supported its establishment. Moreover, at the Assembly of States Parties, States acting as observers – for

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doc/036269/ (Accessed at: 1 July 2023)
"For nearly half a century, and almost since the inception of the United Nations, the international community, through the General Assembly, has recognized the need to establish an international criminal court to prosecute and punish perpetrators of the most heinous international crimes, namely war crimes, crimes against humanity, genocide and aggression [...] The international community and the victims of these very horrifying crimes have suffered enough from the abuse of existing international mechanisms through politically motivated negligence or application of double standards. Thus, we need to put this momentum to the best use and truly seize this propitious moment through understanding and tolerance for diversity, to establish an international court that must be an independent, universal effective and impartial judicial body. [...] An independent and effective international criminal court requires collective preparation and active participation of all States. To this end, flexibility and consensus building constitute the best means for achieving results now and facilitating the work of the ICC in the future. [...] *We all want to see the establishment of an independent judicial body* free from the influence and interference of political organs. [...] In conclusion, *my delegation hopes that we will all witness, in the near future, the establishment of an independent and impartial international criminal court*, which could exercise justice in international community and help realize the aspirations of the human society; a Court that contributes to eliminate and deter acts of cruelty and inhumanity throughout the globe, and thus paves the way for a more humane world order in which peace and justice compliment each other."

250 These items concerned mostly the envisaged role of the Security Council and the independence and objectivity of the Prosecutor in the selection of cases; 'Statement by H.E. M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran', 17 June 1998. Available at: https://www.legal-tools.org/doc/036269/ (Accessed at: 1 July 2023).
For an analysis of this statement, as well as the previous and subsequent events and experts' discussions on the question of the compatibility of the Rome Statute with the Iranian legal system, *see* Abtahi, 2005, pp. 635-648.

example, the USA[251] and China[252] – while recalling their concerns, also emphasized the importance of the ICC on the international plain.

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251 Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, 8 December 2017:
"The United States strongly supports justice and accountability for war crimes, crimes against humanity, and genocide, including through support of domestic accountability efforts. We appreciate the efforts of the ICC and the Parties to the Rome Statute to pursue these objectives. At the same time, recent developments in connection with a request by the Office of the Prosecutor to open an investigation into the situation in Afghanistan raise serious and fundamental concerns that we wish to register today. [...]
By intervening at this meeting, we are expressing our long standing, continuing, and principled objections. We registered these objections throughout the course of the negotiations in the 1990s. We registered these objections following the entry into force of the Rome Statute. And we repeat these objections today. Further, we have long believed and stated that justice is most effective when it is delivered at the local level. In this regard, we don't believe that moving to open an investigation by the ICC would serve the interests of either peace or justice in Afghanistan.The United States stands as a strong ally in the fight to end impunity. Earlier this week, we joined many of you in commemorating the accomplishments of the International Criminal Tribunal for the Former Yugoslavia, an institution we have supported since day one as an important way to help ensure justice for the victims of atrocities committed during the Balkans conflict. Our support for such efforts dates back to Nuremberg and Tokyo. We were one of the most vocal supporters for the creation of tribunals to try those most responsible for atrocities committed in Rwanda and Sierra Leone. And we continue to support a number of hybrid, regional, and domestic efforts to ensure accountability for atrocity crimes, from Guatemala to Syria to Kosovo to South Sudan. The International Criminal Court can play an important role alongside these efforts by exercising its power judiciously within the limits of international law." Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf (Accessed: 1 July 2023).

252 Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the States Parties to the Rome Statue of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017):
"[...] China has always supported law-based efforts to fight against and punish grave crimes that threaten international peace and security and we expect that the International Criminal Court plays a constructive role in this regard. [...]" Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf (Accessed at: 1 July 2023).

## 4. IMPORTANCE OF SIMILARITIES IN THE WORDING OF STATUTORY TEXTS AND OTHER NORMS

Without forgetting the special nature of preambles in the law of international treaties, it is worth remembering that both the UN Charter[253] and the Statute[254] contain such purposes and considerations which are not *inter partes*, but *erga omnes* in character.

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253 Preamble of the UN Charter:
"We the peoples of the United Nations determined
*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the *equal rights* of men and women and *of nations large and small*, and to *establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*, and to promote social progress and better standards of life in larger freedom,
And for these ends
to practice tolerance and *live together in peace* with one another as good neighbours, and *to unite our strength to maintain international peace and security*, and *to ensure*, by the acceptance of principles and the institution of methods, *that armed force shall not be used, save in the common interest*, and *to employ international machinery for the promotion of the economic and social advancement of all peoples* [...]" (emphasis added).

254 Preamble of the Statute:
"The States Parties to this Statute,
Conscious that *all peoples are united by common bonds, their cultures pieced together in a shared heritage*, and concerned that this delicate mosaic may be shattered at any time,
Mindful that *during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*,
*Recognizing that such grave crimes threaten the peace, security and well-being of the world*,
Affirming that *the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*,
Determined *to put an end to impunity for the perpetrators of these crimes* and thus to contribute to the prevention of such crimes,
*Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*,
*Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations*,

In the context of the closeness of the aims contained in the two preambles, let' us put an emphasis on article 2 of the Statute,[255] as well as the special relationship between the UN and the ICC and the applicable agreements.[256]

Some other articles of the Rome Statute are equally relevant from my point of view, like articles 4[257] and 87(6)[258] of the Statute. Moreover, I recall the first three considerations of the preamble[259]

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Emphasizing in this connection that *nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,*

Determined to these ends and for the sake of present and future generations, *to establish an independent permanent International Criminal Court in relationship with the United Nations system,* with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:" (emphasis added)

255 Article 2 of the Statute: Relationship of the Court with the United Nations:
"The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf".

256 *See especially* United Nations, Office of Legal Affairs, 2004a.

257 Article 4 of the Statute: Legal status and powers of the Court:
"1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, *by special agreement, on the territory of any other State.*" (emphasis added)

258 Article 87(6) of the Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask *for other forms of cooperation and assistance* which may be agreed upon with such an organization and which are in accordance with its competence or mandate." (emphasis added)

259 Preamble of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1:
"*The International Criminal Court and the United Nations,*
*Bearing in mind* the Purposes and Principles of the Charter of the United Nations,
*Recalling* that the Rome Statute of the International Criminal Court reaffirms the Purposes and Principles of the Charter of the United Nations,

on the Negotiated Relationship Agreement between the Court and the UN, as well as its articles 7,[260] 15(1)[261] and – in particular – article 17, which covers Security Council referrals,[262] and

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*Noting* the important role assigned to the International Criminal Court in dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute, and which threaten the peace, security and well-being of the world [...]" (emphasis in the original).

260 Article 7 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Agenda items:
"The Court may propose items for consideration by the United Nations. In such cases, the Court shall notify the Secretary-General of its proposal and provide any relevant information. The Secretary-General shall, in accordance with his/her authority, bring such item or items to the attention of the General Assembly or the Security Council, and also to any other United Nations organ concerned, including organs of United Nations programmes and funds".

261 Article 15(1) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: General provisions regarding cooperation between the United Nations and the Court:
"With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute".

262 Article 17 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Cooperation between the Security Council of the United Nations and the Court:
"1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.
2. When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate,

article 18(1) and (2).[263] (See also the formulation "in particular" in article 18(1).) Let's also remind the reader article 12 (entitled "Preconditions to the exercise of jurisdiction") and article 13 (entitled "Exercise of jurisdiction") of the Statute. It is to be highlighted that any activity (if any!) of the Chambers of the Court which cannot be qualified as an "exercise of jurisdiction" does not fall under the scope of these articles. Similarly, while the Prosecutor's main functions are investigation and prosecution, those duties which are of a different nature do not fall under the scope of article 15 of the Statute (for example, diplomatic, communication and outreach activities).

The reader certainly remember the promise made by States in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – today an instrument of quasi-universal participation

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inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.

3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances."

263 Article 18(1) and (2) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Cooperation between the United Nations and the Prosecutor:

"1. With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.

2. Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated *proprio motu* by the Prosecutor pursuant to that article. The Prosecutor shall address a request for such information to the Secretary-General, who shall convey it to the presiding officer or other appropriate officer of the organ concerned."

– where States committed themselves to establishing an "international penal tribunal"[264] with similar competences and working principles as this Court, which was finally established fifty years later.[265]

## 5. SUBSEQUENT PRACTICE AND EXPLANATION OF VOTES IN THE SECURITY COUNCIL

It should be duly noted that non-States Parties (including permanent members of the Security Council) have cooperated or agreed to co-operate with the Court,[266] for instance, in the arrest and surrender

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264 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), 9 December 1948, 78 UNTS 277, article VI: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

265 On the living relationship between the Statute and the Genocide Convention, as well as between the Court and the "international penal tribunal" envisaged by the Genocide Convention, *see further* (albeit in the context of eventual exceptions from head of state immunity), Minority Opinion of Judge Marc Perrin de Brichambaut to Pre-Trial Chamber II, "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir", 6 July 2017, ICC-02/05-01/09-302-Anx, § 10-18, and in particular § 11-13.

266 "We Should at All Costs Prevent the ICC from Being Politicized", Interview with Fatou Bensouda, Chief Prosecutor of the International Criminal Court (ICC):
"- How is your cooperation with non-states parties?
We have received assistance from non-States Parties in many instances. I can give you the example of Bosco Ntaganda. He was indicted by the Court in 2006 for, amongst other things, recruiting child soldiers. In March 2013, he decided to walk into the American Embassy in Kigali (Rwanda) and requested to be transferred to the ICC. Neither Rwanda nor the US is a State Party to the Court. One would have expected this to create difficulties getting hold of Ntaganda, but it happened. We were able to work with both States, and the transfer took place in the most efficient way.
Another example is Russia. We have a preliminary examination on-going in Georgia, in the wake of the August 2008 armed conflict in South Ossetia. Georgia, which is a State Party, has given us documents; we have also visited the country on several occasions. But Russia, a non-State Party, has also sent more than 3000 documents to the Office. This shows that being a non-State Party does not necessarily preclude you from working with the Court." See: Bensouda, 2014. pp. 16-17.

of suspects,[267] have expressed explicit approval of Security Council resolutions referring situations to the ICC,[268] have refrained from

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*See also:* Ms. Fatou Bensouda, Speech at the African Leadership Centre's Simulation Seminar: "A Season of Changes in Africa: Is Africa's Voice Getting Louder?" , African Leadership Centre Keynote, 22 February 2012, available at: https://www.africanleadershipcentre.org/attachments/article/174/ALC%20Keynote%201%20-%20Ms%20Fatou%20Bensuda.pdf (Accessed: 1 July 2023), p. 7.
"In our Libya situation, we have received very good cooperation from the Libyan authorities, and we visited Tripoli at the end of last year."

267 Fatou Bensouda (then Deputy Prosecutor), "Africa and the International Criminal Court", 31 May 2007, Pretoria, South Africa, available at: http://www.africalegalaid.com/download/afla_lecture_series/Africa_and_the_International_Criminal_Court_ICC.pdf (Accessed at: 1 July 2023), p. 5.
"One of the militia commanders – Raska Lukwiya – was killed in a confrontation with the Ugandan army. At the request of the Government of Uganda, forensic experts from the Office of the Prosecutor helped to identify his body. While the four remaining LRA commanders are still at large, the Court has made a significant impact on the ground. This case shows how arrest warrants issued by the Court can contribute to the prevention of atrocious crimes.
The Court's intervention has galvanized the activities of the states concerned. Uganda and the DRC, parties to the Rome Statute and legally bound to execute the arrest warrants, have expressed their willingness to do so. *The Sudan, a non-State Party, has voluntarily agreed to enforce the warrants.*" (emphasis added).

268 UN Press Release, "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters", 26 February 2011, New York, available at: https://www.un.org/press/en/2011/sc10187.doc.htm (Accessed: 1 July 2023)
"VITALY CHURKIN (Russian Federation) said he supported the resolution because of his country's deep concern over the situation, its sorrow over the lives lost and its condemnation of the Libyan Government's actions. He opposed counterproductive interventions, but he said that the purpose of the resolution was to end the violence and to preserve the united sovereign State of Libya with its territorial integrity. Security for foreign citizens, including Russian citizens, must be ensured.
LI BAODONG (China) said that China was very much concerned about the situation in Libya. The greatest urgency was to cease the violence, to end the bloodshed and civilian casualties, and to resolve the crisis through peaceful means, such as dialogue. The safety and interest of the foreign nationals in Libya must be assured. Taking into account the special circumstances in Libya, the Chinese delegation had voted in favour of the resolution [...].
Noting that five Council members were not parties to the Rome Statute that set up the International Criminal Court, including India, that country's representative

exercising their veto power, abstaining under certain conditions, have participated as observers in the works of the Assembly of States Parties,[269] or have consented to outreach activities.[270]

## 6. IMPACT OF ICC JUDGMENTS IN THE LIGHT OF THE "NE BIS IN IDEM RE" PRINCIPLE

It should be born in mind that when the Security Council refers a situation on the territory of a non-State Party to the ICC, this State – if it

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said he would have preferred a 'calibrated approach' to the issue. However, he was convinced that the referral would help to bring about the end of violence and he heeded the call of the Secretary-General on the issue, while stressing the importance of the provisions in the resolution regarding non-States parties to the Statute."

269 The delegation of United States actively participated as an observer State at the Kampala Review Conference in 2010; *see* International Criminal Court, Assembly of States Parties to the Rome Statute, 2010, pp. 3-4, § 4 and p. 126.

270 International Criminal Court, 2016c.
"As part of its commitment to promote a better understanding of the work of the Office of the Prosecutor (the 'Office') of the International Criminal Court ('ICC'), a delegation from the Office will visit Israel and Palestine from 5 to 10 October 2016.
The purpose of this visit will be to undertake outreach and education activities with a view to raising awareness about the ICC and in particular, about the work of the Office; to address any misperceptions about the ICC and to explain the preliminary examination process. *Such visits are standard practice, even in countries that are not State Parties to the Rome Statute.* In accordance with its usual practice at this stage of its work, the delegation will not engage in evidence collection in relation to any alleged crimes; neither will the delegation undertake site visits, or assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction.
The delegation is scheduled to travel to Tel Aviv, Jerusalem and Ramallah and will hold meetings with Israeli and Palestinian officials at the working levels. The delegation will also participate in two events at academic institutions and engage in television and newspaper interviews in both Israel and Palestine. In addition, the delegation will hold a courtesy meeting with United Nations agencies under the auspices of the United Nations Special Coordinator for the Middle East Peace Process ('UNSCO'). Given the limited duration of the visit, the delegation will not engage in unscheduled events or meetings.
The Office is grateful to both the Israeli and Palestinian authorities for facilitating the visit and to UNSCO for providing logistical support. [...]" (emphasis added).

is a UN Member State – is duty bound to cooperate with the Court. This duty stems from its membership in the UN. If this country is not a UN Member State – which is rather a school hypothesis today – the competences enjoyed by the Security Council according to Chapter VII of the UN Charter are sufficient for the Security Council to act and to force the cooperation of the State in case of threats to peace and security. In such a situation, the objective legal personality of the UN assists the ICC to act accordingly.

It is to be emphasized that if a perpetrator is charged and found guilty before this Court – subject to the Court's jurisdictional parameters being met in accordance with articles 11, 12, 13, 14 and 15 of the Statute – for any crime provided for in articles 6, 7, 8 and 8*bis* of the Statute, his/her conviction – pronounced according to the rule of law guarantees, enumerated in different articles of the Statute and, in particular, in articles 22, 23, 24, 25, 31, 66 and 67 – should be duly taken into account before any national jurisdiction in order to avoid double jeopardy (*ne bis in idem re*), a legal principle belonging to the core elements of the rule of law. Given the universally recognized customary law character of the *ne bis in idem re* principle (or according to certain doctrinal schools, its character as a general principle of law recognized by nations), the fact that a State is or is not a State Party to the Statute has no practical relevance as long as the same person/same conduct test is met.

If the Court pronounces a sentence and this sentence is executed in a State Party to the Statute, it should be taken into account also in non-States Parties, especially considering an eventual bilateral agreement between the Court and the State on the enforcement of sentences if the person in question falls within the scope of application of the agreement.

## 7. HYBRID NATURE OF THE ROME STATUTE

I recall also the hybrid nature of the Statute which often contains, beside the precise institutional or procedural provisions agreed upon at the Rome Diplomatic Conference, *verbatim* formulations as existing, quasi-universal treaties (such as, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1899, 1907, 1954

Hague Conventions, the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005 and the 1989 Convention on the Rights of the Child).

Moreover, substantial parts of articles 7 and 8 of the Statute are generally considered to be customary law (*i.e.* "pure codification" elements) while other parts represent a "progressive evolution" of custom.[271] Other formulations reflect wellestablished judicial interpretations of the laws of war, for example, according to the Nuremberg and Tokyo tribunals, the ICTY, the International Criminal Tribunal for Rwanda (the "ICTR") and other international or hybrid tribunals.

While recognizing the paramount importance of article 34 of the Vienna Convention on the Law of Treaties[272] (*pacta tertiis nec nocent nec pro sunt*), I refer also to article 38 of the said Convention,[273] as well as other exceptions[274] generally recognized by scholars and international jurisprudence.

All this should be understood in the mirror of article 21(2) of the Statute on the role of previous decisions of the Court on the interpretation of the Statute.

In concluding this part, a special emphasis should be put on the existence of the ICC as an objective fact, *i.e.* a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties,

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271 On the importance of the distinction, *see e.g.* ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Germany/The Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3.

272 Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p. 331, Section 4: Treaties and third states, Article 34: General rule regarding third States: "A treaty does not create either obligations or rights for a third State without its consent".

273 Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS vol. 1155, p. 331, Article 38: Rules in a treaty becoming binding on third States through international custom:
"Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such".

274 *See e.g.* peremptory norms of international law (*jus cogens*), "objective regimes", collateral treaties, repetition of well-established custom (if the State was not a persistent objector when the custom in legal terms was still in *statu nascendi*), reappearance/repetition of the State's commitments contracted elsewhere.

but with a great number of non-States Parties as well, whether signatories or not.

Having said that, it is be underlined that the objective legal personality of the Court does not imply however either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 14 and 15 of the Statute.

## 8. ANALYTICAL ACTIVITY OF THE PROSECUTOR AND THE OTP?

The importance of properly distinguishing between States Parties and Non-States Parties must not be forgotten. This distinction is reflected in, *inter alia,* articles 4(2), 12(3), 15*bis*(5), 87(5), 90(4) and (6), and 93(10)(c) of the Statute.

Jurisdiction is an aspect of the historic mission States Parties conferred on the ICC but it is certainly not the only one.

In this regard, it is to be noted that the ICC has both judicial and non-judicial competences. The following are examples of its non-judicial competences: (i) relief (through the mandate of the Trust Fund for Victims); (ii) analysis; (iii) publication; (iv) scientific synthesis; (v) professional formation; (vi) outreach; (vii) contacts with States, intergovernmental organizations and bodies such as the different international tribunals and human rights courts; (viii) competences as an employer over its staff; and (ix) domestic legal competences for entering into civil law contracts with different service providers in the Netherlands and elsewhere.

The exercise of jurisdiction, which falls within the Court's judicial competences, is subject to a number of stipulations contained in the Statute. More specifically, these stipulations are contained in articles 11, 12, 13, 14, and 15 of the Statute and concern: (i) the distinction as to the actors that are entitled to submit a referral and those that are not; (ii) the differentiation between States Parties and Non-States Parties; and (iii) the conditions for *proprio motu* action by the Prosecutor.

In this regard, it is to be noted that any activity by the Prosecutor on the territory of a Non-State Party is subject to the consent of

that State. Even so, if the exercise of the Court's jurisdiction is not *prima facie* excluded in relation to crimes within the jurisdiction of the Court taking place on the territories of a State Party and a Non-State Party, the Prosecutor may initiate activities on the territory of the State Party. It remains for the Prosecutor to determine whether such activities suffice.

Other activities are regulated elsewhere in the Statute. These are, in particular, set forth in articles 4(1), 42(9), 43(1), and 112(2)(a) and (2)(g) of the Statute, in conjunction with the Regulations of the Office of the Prosecutor[275] or specific documents adopted by the Assembly of States Parties, such as the Regulations of the Trust Fund for Victims.[276]

In this context, I feel the study and analysis of relevant materials are not equal to the exercise of jurisdiction by the Court. Such study and analysis certainly can form part of the exercise of jurisdiction by the Court.[277] However, the study and analysis of commonly accessible material and pieces of information and communications directly received by the Prosecutor form an integral part of the Prosecutor's activities – as well as that of the Presidency of the Court. This is especially the case regarding contacts, briefings, and exchanges of views with, as well as proposals to, the UN Secretary General, the UN Security Council, or other organs and institutions of the UN. This is also required when contacts are initiated or developed with States Parties and Non-States Parties. (See as an example on these types of contacts the Prosecutor's visit in Qatar[278] or the already

275 *See for example* regulations 15, 23, 24, 25(1), 26, 27, and 28 of Regulations of the Office of the Prosecutor.

276 International Criminal Court, 2005. *See in particular* regulations 50(a)(i) and 53 of the Regulations of the Trust Fund for Victims.

277 Article 15(2) of the Statute: "The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court".

278 "ICC prosecutor voices regret over anti-Qatar blockade: Fatou Bensouda visits Doha to discuss violations of international accords committed by the blockading states. On Sunday, ICC's Fatou Bensouda met Qatar's Emir Sheikh Tamim bin Hamad Al Thani in Doha and discussed the violations of

referred visit of the OTP experts for "outreach and education" in Israel and Palestine[279].)

Articles 4(2)[280] and 87(5(a)[281] of the Statute refer to the necessity of preparing agreements of cooperation with Non-States Parties for the purpose of exercising the Court's functions and powers on their territory. For other activities, such as receiving information from intergovernmental organizations, no prior agreement is necessarily required.[282] However, in relation to the Court's relationship with the United Nations,[283] the Rome Statute calls for the conclusion of an agreement.[284] Agreements with other organizations have been entered into as well.[285]

The analysis of communications, documents, and reliable open source material can contribute to, *inter alia*, verifying whether nationals of States Parties can be identified amongst alleged perpetrators

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international accords as well as human rights abuses committed by the four blockading countries. QNA, Qatar's state news agency, reported that Bensouda praised Doha's mature handling of the crisis. The meeting also dealt with fields of cooperation between Qatar and the ICC, QNA reported." Available at: https://www.aljazeera.com/news/2017/07/icc-prosecutor-expresses-regret-anti-qatar-siege-170709192916957.html (Accessed: 1 July 2023)

279 International Criminal Court, 2016c

280 Article 4(2) of the Statute: "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State".

281 Article 87(5) of the Statute: "The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis".

282 Article 87(6) of the Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate".

283 Article 2 of the Statute: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf".

284 *See* United Nations, Office of Legal Affairs, 2004a.

285 *See for example* Agreement between the International Criminal Court and the European Union on Cooperation and Assistance (2006); Letter of Understanding on Co-operation between the Office of the Prosecutor of the International Criminal Court with Eurojust (2007).

vis-à-vis whom the Court could exercise jurisdiction based on article 12(2)(b) of the Statute.

Furthermore, when the Prosecutor is entitled to investigate according to article 53 of the Statute, she may benefit from the fruit of her previous analytical activities. In addition, when, on the basis of the information acquired during her diplomatic outreach activity, the Prosecutor feels that the conditions laid down in articles 11, 12, 13, 14, and 15 of the Statute are close to being realized, she may accelerate and shape appropriately the rhythm and directions of her analytical activity in order to be prepared to act as soon as possible when the preconditions for the exercise of the Court's jurisdiction are fulfilled in accordance with the aforementioned provisions.

## 9. CONCLUSIONS

In my view, all the above substantiate that the International Criminal Court was set up by the States with the ambition of creating an international judicial body, enjoying an *erga omnes,* objective character even if due attention was paid to the distinction between States Parties and non-States parties.

The States-Parties' obligations on cooperation are precisely defined in the Rome Statute while the cooperation with non-States Parties depend on particular agreements to be concluded. The practice witnessed by the way that several non-States Parties were ready to cooperate or to act with a pro-ICC because in the given case this coincided with their own national interests or because they assumed their responsibilities in the global fight against some particular international crimes.

The preponderant role recognized to the Security Council in the triggering mechanism of jurisdiction concerning situation in non-States Parties shows well that at the Rome Diplomatic Conference, the governments paid not only a great attention to the distinction between States parties and non-States Parties but also to the maintenance of the decisive role of the permanent members of the Security Council in the affairs of the world, with all the chances and failures that we have known well since 1945. The differences between States Parties and

non-States Parties do not have a direct influence on the character of the legal personality of the Court: according to my view it is an objective personality – or if not, it should be.

Let's hope that the International Criminal Court will have such a situation on its agenda which would give it the possibility and the ambition to act in the same way as the International Court of Justice did in the Bernadotte advisory opinion.

## 10. ADDENDUM

This manuscript was accomplished some weeks before the adoption of the decision of the ICC in the matter[286]. The author is happy that most parts and the main lines of the argumentation – including also the adaptation of the "Bernadotte formula"[287] were later reflected - either *verbatim* or *mutatis mutandis* - also in the decision adopted by the Pre-Trial Chamber on the 6th of September 2018 in the context of the Prosecutor's request for a ruling on jurisdiction over the situation of the Rohingyas.

286 International Criminal Court, 2018b.
287 See § 48 of the decision.

# CHAPTER IV

# The Rome Statute and non-States Parties[288]

## 1. THE ROME STATUTE AND ITS JURISDICTIONAL COORDINATES

As it is well-known, the Rome Statute built the jurisdictional competence of the International Criminal Court on three pillars. The first one is the competence based on the State Party status, which establishes jurisdiction over crimes either committed on a State Party's territory (*iurisdictio ratione loci*) or over a crime committed by a State Party's national (*iurisdictio ratione personae*)[289]. The second pillar is the referral by the Security Council of the United Nations 'acting

288 This chapter is based on my lecture given in July 2023 at the *XIX International Law Winter Program of the Centro de Direito Internacional, Belo Horizonte* (Minas Gerais, Brazil).

289 See Article 12 (1) and (2)(a) and (b).
Article 12 Preconditions to the exercise of jurisdiction
1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.
Article 13 Exercise of jurisdiction
The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

under Chapter VII', which may concern either States Parties or non-States Parties.[290] The third pillar is when a non-State Party accepts the jurisdiction of the ICC which may concern either the crimes committed on its territory or by its national(s).[291]

During the Rome Diplomatic conference, the American delegation, acting under the Clinton-establishment and in principle very much attached to the idea of setting up the International Criminal Court, could not get its proposal accepted i.e. that in case a non-State Party is involved in an event having occurred in a State Party, the *ratione loci* jurisdictional competence of the International Criminal Court should not be implemented without the preliminary consent of the given non-State Party *ratione personae*.

Although probably several governmental delegations hoped that the American proposal would go through, it was rejected by a great majority arguing that *i.* in this way, a non-State Party could enjoy a quasi-veto right over whatever ICC action concerning its nationals, and *ii.* if the philosophy underlying the creation of the tribunal is based on the transfer of the home competence principle, the ICC could also have the same competences as the ones exercised at national level according to international customary law on the basis of territorial sovereignty over foreigners having committed crimes in the given country, irrespective of the fact whether this is welcome by the offenders' own state.

However, the Kampala amendment, building the definition of aggression into the Rome Statute and ratified by 2023 by 45 States, i.e.

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(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

290 See Article 13 (b) in the previous footnote.

291 See Article 12 (3).
Article 12 Preconditions to the exercise of jurisdiction (...)
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

one third of the States Parties to the Statute, follows a different approach, because the jurisdiction over aggression is not linked to the alternative ('either / or') but to the cumulative ('and') conditions *ratione loci* and *ratione personae*.

The ICC may exercise its jurisdiction over the crime of aggression if the given act has been committed on the territory of a State Party having ratified the Kampala amendment and by forces of another State Party having also ratified the Kampala amendment.[292]

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292 See Rome Statute, Articles 8bis, 15bis, read in conjunction with Article 121 (5); Article 8 bis Crime of aggression
1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (...) [enumeration *verbatim* of the modalities according to UNGA Res 3314] Article 15bis Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
Article 121 Amendments
4. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

It is true that the Security Council is also empowered with the right of referral concerning either States Parties or non-States Parties[293]. However, political realism and the history of the United Nations make us say that this is rather the proof of the logical closure of the system than a clear legal commitment promising that the UNSC will always step in immediately whenever and wherever aggression occurs and submits the referral on the Prosecutor's table.

As for the question of other crimes falling under the ICC jurisdiction (i.e. genocide, crimes of humanity, war crimes), we should ask ourselves whether the 'either / or' approach goes really against the basic rules of international law and defies the principle of *'pacta tertiis, nec nocent, nec pro sunt'* or not.

On the one hand, any State – on the basis of their territorial sovereignty – undoubtedly enjoys criminal jurisdictional competence over perpetrators of crimes on the national territory (let's put aside for the sake of simplicity the issue of diplomatic and similar immunities and the expectancy of the home prosecution as a counter-part) and this competence does not depend on the fact whether the other state involved *ratione personae* likes or dislikes that its citizen is subject of penal prosecution for murder or other serious crimes or for an average road accident. If the procedure is in conformity with the rule of law, human rights and procedural guarantees, the given State cannot do rightfully anything else than offer consular protection to its national or propose the take-over of the imposed penalties and in case of acceptance, the condemned person will serve their term in a penitentiary institution of their home country.

If this is so 'evident' and identical in the national legal systems, like-minded States could empower the International Criminal Court to exercise 'their' penal prosecution. Such a *sui generis* transfer of jurisdictional competence coupled with the principle of complementarity was considered legally correct, therefore acceptable by the great

293 See Rome Statute Article 15 ter Exercise of jurisdiction over the crime of aggression (Security Council referral)
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

majority of the governmental delegations participating at the Rome Diplomatic Conference and at previous meetings.

The question is of course much more complicated than as presented briefly because political realities, crystal clear legal rules of national systems and fundamental legal principles of international law do partly harmonize, but also challenge each other.

It is a fact the American delegation did not leave the conference even after it became clear that its position is not backed by most of the other delegations and its activity was not slowed down. It is also true that all this was done with the warning that *'till there is no agreement in all the issues, there is no agreement in anything'*.

The final text was prepared on the last week by Philippe Kirsch, head of the Canadian delegation and also that of the Committee on the Whole, helped by his *ad hoc* team, using the *in abstracto* very concording, but *in concreto* and in details very different proposals submitted to the draft by the delegations, who nearly unisono emphasized in their concluding statements that they were devoted to the establishment of the ICC. This final version, which was the result of heroic effort, and which did not contain any more brackets, square brackets, alternative or conflicting proposals, was put on the table with the saying: *Take it or leave it.* It received a massive support: 120 delegations voted in favour, 7 against and 21 were abstaining.

Nevertheless, the relationship of the adopted text finalized from proposals always enjoying a manifest support at the diplomatic conference and the relative effect of treaties (*'pacta tertiis nec nocent, nec pro sunt'*) needs to be scrutinized.

One cannot put aside the question of the nature *i.* of the text as such and *ii.* of its rules. Are the rules only of *inter partes* character, or some of them enjoy *erga omnes* nature considering the practice of the 1969 Vienna Convention on the Law of Treaties? Are all the articles of treaty law character, or do some of them merely repeat elements of *quasi* universally adopted conventions or international custom?

On the other hand, even if the logical system of the jurisdictional competences in the Rome Statute is perfect and conform to the fundamental rules of international law, it is also evident in the light of the experience acquired during the eight decades elapsed since the foundation of the

United Nations Organization that the special foreign policy interests of the five permanent members of the Security Council can easily be recognized underlying the steps taken and the steps missed.

Moreover, out of the UNSC referrals concerning the situation in Sudan and the situation in Libya, containing several potential or legally identified cases, only one case reached trial level before the bench, namely the Prosecutor v. Abd al-Rahman/Ali Kushayb case[294]. The other cases were or are blocked either because of the lack of cooperation on behalf of the situation country (Al Bashir[295], Saif Al-Islam Kadhafi[296] cases) or they had to be closed due to the suspects' death. (The Prosecutor v. Moammar Kadhafi[297], Al Werfalli[298], Al Tuhami[299] cases.)

As a matter of fact, the voluntary submission of a situation country – according to Article 12(3) of the Rome Statute – takes only place when this is in the interest of the given state. Apparently, this happens when a regime change or fundamental internal political changes occur in a given state.

## 2. OTHER POSSIBILITIES FOR ICC COMPETENCE RATIONE LOCI – ACCORDING TO THE JUDICIAL PRACTICE

It is worth emphasizing that the jurisdictional competence of the ICC can eventually be built on a special combination of territorial factors.

### 2.1. The interpretation of the principle of territoriality in a situation involving directly a non-State Party and a State party: the example of Rohingyas pushed from Myanmar to Bangladesh.

An example of such a combination is the jurisdictional competence confirmed upon the Prosecutor's request related to the crimes committed against the Rohingya Muslim community originally living in

294 Abd-Al-Rahman Case. The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")
295 Al Bashir Case. The Prosecutor v. Omar Hassan Ahmad Al Bashir
296 Gaddafi Case. The Prosecutor v. Saif Al-Islam Gaddafi
297 Gaddafi Case. The Prosecutor v. Saif Al-Islam Gaddafi
298 Al-Werfalli Case. The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli
299 Khaled Case. The Prosecutor v. Al-Tuhamy Mohamed Khaled

Myanmar. Even if allegedly a certain part of the Rohingyas can be considered as living since immemorial times in Myanmar (formerly: Burma), the ancestors of most of them probably arrived there in the 18th and 19th centuries, during the British imperial rule. To put it simply, we can say that today's Rohingyas are the descendants of 'migrant workers' invited to work on British plantations as labourers, domestic servants or maids.

As it is well known, at the end of the British rule in 1947, the borders of the newly born sovereign states of the Hindustan peninsula were defined according to the religious appurtenance. India was created from Hindu territories, while Pakistan was established on Muslim territories. However, in 1971, the former East-Pakistan seceded and achieved its independence under the name of Bangladesh.

Myanmar (Burma) became independent in 1948 as a plurilingual and multireligious country, where Buddhists are in majority. The army (*Tatmadaw*) plays a decisive role irrespective of the fact whether the government is openly military, or civilian based on electoral results.

The situation of the Rohingyas living predominantly in Rakhine state lying at the Western coast had never been enviable and in the context of an exalted nation-state concept, they were treated as migrants from abroad and colonialists' servants. In 1982, the parliament adopted a law declaring the Rohingyas foreign citizens living in Myanmar. They were *ex lege* deprived of Myanmar's citizenship disregarding the fact whether they were citizens of Bangladesh or of any other countries. What's more, a constitutional amendment rendered it even more difficult for Rohingyas to acquire citizenship in Myanmar.

A small part of the Rohingyas organised themselves into extremist armed formations, but most of them either thought that their situation could improve in long terms or – as a consequence of the military attacks of the *Tatmadaw* evoking the necessity to fight against terrorism – flew – according to the geographical realities – mostly to Bangladesh, i.e. to the territory named Cox Bazar (even if some of them entered India, the Tripura territory at the border with Myanmar). All this happened within a couple of months and the estimated number of Rohingyas finding refuge in Bangladesh in 2017-2018 was about 700-800 000.

This is the background of the Prosecutor's request submitted to one of the Pre-Trial Chambers and asking for a preliminary ruling whether the International Criminal Court enjoys jurisdiction over the situation of Rohingyas, alleged victims of deportation, a crime the most part of which occurred in Myanmar, a non-State Party but one element – i.e. being forced through the border into Bangladesh – concerns definitely the territory of a State Party.[300]

Having reviewed the international criminal jurisprudence of the states and of the international tribunals, the Pre-Trial Chamber concluded[301] that the fact that one single constitutive element of the crime relates to the territory of a State party is sufficient in itself.[302] Taking into account the wording of Article 7(1)(d)[303], this element is the arrival at the state-territory of Bangladesh of the persecuted Rohingyas having crossed the border, which is the factor distinguishing 'deportation' from 'forcible transfer'. 'Deportation' concerns a crime involving the territory of at least two States while 'forcible transfer' is realized on the territory of a single State. [304]

The Elements of crimes, a document of *sui generis* nature [305] adopted by the Assembly of States Parties played an important role in the

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300 International Criminal Court, 2018e
"4. The Prosecution seeks a ruling on the Court's jurisdiction under article 12(2)(a)— specifically, to verify that the Court has territorial jurisdiction when persons are deported from the territory of a State which is not a party to the Statute directly into the territory of a State which is a party to the Statute."

301 International Criminal Court, 2018b. (In the followings: Preliminary ruling on Rohingyas' situation, 2018.)

302 "In the light of the foregoing, the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold. This conclusion is without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings." Preliminary ruling on Rohingyas' situation, 2018, § 73, p. 42.

303 Article 7 (1) (...) (d) „Deportation or forcible transfer of population;"

304 See especially §§ 50-73 of the Chapter VI in the ruling!

305 About the special legal nature of this document see e.g. Kovács, 2000, pp. 96-115.

interpretation because its explanation of Article 7(1)(d)[306] referred *"to another State or another location"*.

In its preliminary ruling, which was highly similar to a traditional 'advisory opinion', the International Criminal Court pointed out that its jurisdiction can also be established over crimes that are intimately related to 'deportation'.[307] The Pre-Trial Chamber explained that such crimes can be *inter alia persecution* falling under Article 7 (1)(h)[308] and *other inhuman acts* according to Article 7(1) k[309]. This latter could presumably be realized through the severe pain the victims felt when they had to leave their home and the surroundings without any hope to return.[310]

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306 International Criminal Court, 2013:
"Article 7 (1) (d) Crime against humanity of deportation or forcible transfer of population
Elements:
1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or
systematic attack directed against a civilian population. "

307 "The Chamber considers it appropriate to emphasise that the rationale of its determination as to the Court's jurisdiction in relation to the crime of deportation may apply to other crimes within the jurisdiction of the Court as well. If it were established that at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to article 12(2)(a) of the Statute." Preliminary ruling on Rohingyas' situation, 2018, § 74, p. 42

308 Article 7(1)(h) "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime
within the jurisdiction of the Court;"

309 Article 7(1)(k): "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

310 Preliminary ruling on Rohingyas' situation, 2018, §§ 74-77, pp. 42-44.

Shortly after this preliminary ruling, the Prosecutor submitted a request for authorization to start an investigation in Myanmar. A new Pre-Trial Chamber granted it[311] and after a thorough comparative law analysis and the evocation of the competence transfer theory (i.e. from the State Party to the ICC), it repeated the *dictum* that the presence of a single constitutive element involving the territory of a State Party is sufficient.[312]

## 2.2. An unsuccessful attempt to extrapolate the Rohingya-dictum: the situation of the Uyghurs in China

Subsequently, the Prosecutor received a communication qualifying the situation of the Uyghurs as genocide because they are forced to live in 're-education camps'. In order to substantiate the charge of genocide, the communication referred to the alleged practice of' forced sterilization' in these camps. In addition, execution, torture and other inhuman acts were also denounced. China is not a State Party to the Rome Statute, but the communication argued that Tajikistan and Cambodia, two States Parties, expulsed Uyghur refugees or tacitly consented to their kidnapping by Chinese services. According to the document, this territorial involvement is sufficient to establish the ICC's jurisdiction over the situation.

While expressing her concern over the compatibility of these people's return to China with human rights and international law, the Prosecutor claimed that the constitutive elements of the crime of genocide, forced sterilization, execution and imprisonment – if they really occurred – seem to have been realized exclusively on China's national territory. Given these circumstances, she does not have *ratione loci* competence over the situation.[313]

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311 International Criminal Court, 2019f. (In the followings: Authorization of investigation in Rohingyas' situation, 2019.)

312 Authorization of investigation in Rohingyas' situation, 2019, §§ 54-62, pp. 24-28.

313 International Criminal Court, The Office of the Prosecutor, 2020b, §§ 70-76, pp. 18-20.

### 2.3. Philippine fishermen's conflict with Chinese naval forces

A communication considered in 2019 that crimes of *persecution* and *other inhuman act* had been committed by the Chinese navy when preventing Philippines' fishing activity around the Spratly archipelago and the Scarborough shoal and in the neighbourhood of the artificial islands built on such a part of the South Chinese Sea which belongs – according to Manilla – to the Philippines' exclusive economic zone in conformity with the Montego Bay Convention.

The Prosecutor gave a surprisingly lengthy analysis of the communication but finally, she rejected it, emphazing that the *ratione loci* jurisdiction of the Rome Statute may only concern territory under a state's sovereignty and the different titles of exclusive use, exploitation etc. cannot be equated with the exercise of territorial sovereignty.[314]

### 2.4. Combination of ratione loci and ratione temporis principles in case of the denunciation of the Rome Statute: the situation in the Philippines and the crimes committed during the war against drugs.

When a State Party becomes a non-State Party, i.e. when it denounces its participation in the Rome Statute, the jurisdiction of the ICC depends on the fact whether the crime under preliminary examination, investigation, confirmation procedure or trial has allegedly been committed *ratione temporis* during the membership period or later. The International Criminal Court met this issue in the context of the situation in the Philippines where - according to the Prosecutor – the number of the people who were 'killed during evasion', 'shot dead during legitimate defence situation of the police' or 'passed away during their arrest and interrogation' was shockingly high. [315] In the meantime, the

314 International Criminal Court, The Office of the Prosecutor, 2019, §§ 44-51, pp. 14-16.

315 The Prosecutor estimated their number between 12000- 30000. International Criminal Court, 2021s, § 2, p. 3.

*Philippines* denounced the Rome Statute (which recognizes *expressis verbis* the right to withdraw[316]) during the *preliminary examination.*

Under these circumstances, the Prosecutor acting *proprio motu* requested authorization to investigate in a timeframe the end of which coincided with the last day of the Philippines' membership at the International Criminal Court.[317] The Pre-Trial Chamber granted the request.[318] Later, in 2023, in the context of a challenge concerning

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316 Rome Statute Article 127 Withdrawal
1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

317 International Criminal Court, 2021s, § 5, pp. 3-4:
"(...) While the Philippines' withdrawal from the Statute took effect on 17 March 2019, the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party, from 1 November 2011 up to and including 16 March 2019."

318 International Criminal Court, 2021t, §§ 110, 111, pp. 37-38:
"110. The Chamber notes that the Philippines deposited its instrument of ratification of the Rome Statute on 30 August 2011, and the Statute entered into force for the Philippines on 1 November 2011, in accordance with Article 126(1) of the Statute. On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute with the UN Secretary-General, and in accordance with Article 127 of the Statute, the withdrawal took effect on 17 March 2019. While the relevant crimes appear to have continued after this date, the Chamber notes that alleged crimes identified in the Article 15(3) Request are limited to those during the period when the Philippines was a State Party to the Statute and was bound by its provisions.
111. While the Philippines' withdrawal from the Statute took effect on 17 March 2019, the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party, from 1 November 2011 up to and including 16 March 2019. This is in line with the law

certain subsequent procedural steps, the Appeals Chamber confirmed the jurisdiction of the ICC over the situation in the Philippines.[319]

## 3. THE JURISDICTIONAL COMPETENCE OF THE INTERNATIONAL CRIMINAL COURT RATIONE PERSONAE CONCERNING SINGLE, DOUBLE OR MULTIPLE CITIZENSHIP AND SIMILAR SITUATIONS

### 3.1. Jurisdiction over the crimes committed by British forces in Iraq

British forces were engaged in Iraq in the framework of the US led military coalition set up in order to counter Saddam Hussein's presumed renewal of the mass destruction weapon industry but mainly to evince the dictator and set up a pro-US regime in the Middle East. As it is well-known, later, the intelligence information justifying the attack proved to be false and the danger was largely over-estimated. Unfortunately, the current internal situation in Iraq and in the region is so precarious in the post-Saddam era that many analysts and politicians challenge not only the legitimacy of the war engaged without any mandate from the Security Council but also its geopolitical usefulness.

Moreover, more and more shocking media articles revealed unlawful killings, torture, inhuman acts and other crimes committed by the allied forces.

This news concerned not only the American but also the British forces and the media in the United Kingdom published several victims' and witnesses' testimonies. The Prosecutor opened *proprio motu* a preliminary examination in the matter. Contrary to the United Kingdom, Iraq is not a State Party to the Rome Statute, which means that the jurisdiction *ratione loci* could not be the basis for the prosecution. However, the criterion of the jurisdiction *ratione*

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of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination. (...)"

319 International Criminal Court, Office of the Prosecutor, 2023h; International Criminal Court, 2023i.

*personae* was applicable as far as soldiers belonging to the British expedition forces were concerned.

The preliminary examination took a very long time and Fatou Bensouda, referring to the complementarity principle and the national procedures[320], finally decided not to open an investigation. As the Prosecutor emphasised in her 184 page long report[321] published on December 9, 2020, even if the very long British disciplinary and criminal procedures did not lead to very heavy sanctions, she could still not conclude that they were only engaged *'for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court'*[322] as the Rome Statute stipulates it in the disposition on exemption from the *ne bis in idem re* rule.[323] According to official statements in the press, British investigations at home have also been extended to the special forces since then. [324]

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320 Beale, 2020; Hansen, 2020, pp. 2-4.; Mudukuti, 2019.

321 International Criminal Court, Office of the Prosecutor, 2020c.

322 International Criminal Court, 2020e; Schueller, 2020.

323 Rome Statute Article 20 *Ne bis in idem*
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

324 Afghanistan war crimes inquiry focused on conduct of UK's special forces, defence secretary Ben Wallace says, available at: https://news.sky.com/story/uk-special-forces-at-centre-of-afghanistan-war-crimes-inquiry-says-defence-secretary-12915382 (Accessed: July 2023); UK's Afghanistan inquiry to centre on 'conduct' of special forces, available at: https://www.aljazeera.com/news/2023/7/5/british-soldiers-at-the-centre-of-afghanistan-inquiry-minister (Accessed: July 2023)

### 3.2. The jurisdiction of the International Criminal Court in case of double nationality - according to the OTP

What about double or multiple citizenship in the application of the jurisdiction *ratione personae*? The question is especially relevant when one of the perpetrator's citizenships is that of a State Party and the other is that of a non-State Party.

In the document entitled *Policy paper on case selection and prioritisation*, similarly to the jurisprudential approach of the "European citizenship" (i.e. ECJ and the Micheletti principle) the Prosecutor stated that the OTP does not want to follow the theory of the 'effective nationality' (i.e. ICJ and the Nottebohm-principle) and the legal existence of the citizenship of a State Party should be considered sufficient in order to substantiate the jurisdiction of the ICC *ratione personae*.[325]

This statement apparently gave food for thought to academic or NGO-related authors of several communications, which explains why the yearly reports of the OTP have been dealing with this issue sometimes shortly, sometimes more lengthily.

### 3.3. A rejected proposal to apply the rule on Kim Jong Un

One of the Prosecutor's reports gave a detailed overview of the analysis of the application which suggested that the ICC has jurisdiction

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325 International Criminal Court, Office of the Prosecutor, 2016a, p. 10.:
"27. In accordance with article 12(2) of the Statute, the exercise of the Court's jurisdiction over individuals may be based on the principles of territory or nationality. Where the Office proceeds on the basis of territorial jurisdiction, it can investigate all alleged crimes occurring in a particular territory or State, irrespective of whether the individual concerned is a national of a State Party or a non-State Party. Where jurisdiction is based solely on nationality, the Office can investigate crimes allegedly committed by nationals of a State Party or of a State which has accepted the exercise of jurisdiction by the Court under article 12(3), even if that conduct has occurred on the territory of a State not party to the Statute. In the latter case, the Office will consider investigating such a person if he or she falls within the scope of the Prosecution's strategy for case selection and prioritisation as set out in this paper. In this regard, the Office will not consider as a bar to the exercise of criminal jurisdiction the fact that a dual national falls within the personal jurisdiction of the Court under one nationality, but not the other."

over Kim Jong Un, supreme leader of the *Democratic People's Republic of Korea* (North Korea) even if this country is not a State Party to the Rome Statute. The communication claimed that the law on citizenship of the *Republic of Korea* (South Korea) allegedly also grants citizenship to North Koreans *ex lege* and *ipso facto*.

After a detailed analysis of the South Korean law on citizenship, the Prosecutor concluded that the given piece of legislation – contrary to the allegations of the communication – does not grant an automatic acquisition of citizenship to North Koreans but secures a preferential possibility of naturalization on the person's own demand. Under these circumstances, the ICC does not have jurisdiction over Kim Jong Un.[326]

### 3.4. In abstracto applicability of the theory in the context of a terrorist attempt in Lebanon

The issue of double citizenship turns up in the context of a failed terrorist action planned in Lebanon, with a probable Syrian background. The key figure was a double national enjoying both Canadian and Lebanese citizenships. (Canada is a State Party but Lebanon is not.) The Prosecutor confirmed that the Canadian citizenship in itself is sufficient for a jurisdiction *ratione personae* but she did not open an investigation. She considered that the failed terrorist plan did not reach the threshold of gravity which would require the exercise of the ICC's jurisdiction.[327]

### 3.5. Crimes committed by soldiers of a legally non existing State v. ICC jurisdiction ratione loci and / or ratione personae?

#### 5.3.1. The 'Islamic State' and the ICC

People associated with the so called *'Islamic State' (ISIS* or *Daesh)* have committed plenty of crimes on territories that belong to Syria or Iraq according to the international law. However, none of these countries are States Parties. Nevertheless, as you will all know, a great number of people joining the local Islamist warriors are citizens

326 International Criminal Court, Office of the Prosecutor, 2019, §§ 28-35, pp. 9-11.
327 International Criminal Court, Office of the Prosecutor, 2020b, §§ 64-69, pp. 17-18.

of Western European countries: although not all of them might stem from the Near-East, most of them can be considered as first or second generation immigrants possessing French, Belgian or German citizenship either on the basis of their birth place (*ius soli*) or of their parents' nationality (*ius sanguinis*) if their parents had already been naturalized.

In one of her press releases, the Prosecutor referred to an in-depth enquiry, where she concluded that the real leaders of the ISIS are probably Iraqi or Syrian citizens and 'returnees' seem to play a very subordinate role in the hierarchy. Taking into account this factor coupled with the lack of referrals on behalf of the *ratione loci* or *ratione personae* involved States or the Security Council, she did not consider it imperative to open a preliminary examination *proprio motu*.[328]

### 5.3.2. ICC jurisdiction over crimes committed by armed and auxiliary forces of secessionist territorial formations: the situation in Georgia

In 2015, the Prosecutor asked for authorization to open a *proprio motu* investigation over war crimes allegedly committed in and around the secessionist South-Ossetian territory *i.* by the south-Ossetian authorities against ethnic Georgian population, *ii.* by the soldiers of the intervening Russian army with air and armed ground forces against ethnic Georgian population, and *iii.* by the Georgian forces against South-Ossetians and units of the Russian Army which were present as internationally mandated peace-keeping forces.

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328 International Criminal Court, 2015d:
"(....) The information available to the Office also indicates that ISIS is a military and political organisation primarily led by nationals of Iraq and Syria. Thus, at this stage, the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited. In this context, I have come to the conclusion that the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage. A renewed commitment and a sense of urgency on the part of the concerned states may help identify viable avenues. The decision of non-Party States and the United Nations Security Council to confer jurisdiction on the ICC is, however, wholly independent of the Court.(...) "

As Georgia is a State Party, it goes without saying that the jurisdiction of the International Criminal Court can be substantiated *ratione loci*[329]. The decision issued in 2016 granting the request contained however a statement i. e. that there is no need to examine whether there was whatever home prosecution on behalf of the South-Ossetian authorities, because actions of a legally non-existing and not sovereign 'State' are irrelevant from the point of view of the *ne bis in idem re.*[330] In a partly separate opinion[331], I expressed my concerns emphasizing that such a statement would not at all incite secessionist authorities to prosecute their soldiers for violation of international humanitarian law. Moreover, even if the text of Articles 17[332] and

329 International Criminal Court, 2016d, § 6, p. 5. (In the followings: Decision, situation in Georgia, 2016):
"(....) With regard to the latter, the Chamber agrees with the submission of the Prosecutor (Request, § 54.) that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations."

330 Decision, situation in Georgia, 2016, § 40, p. 18.:
"In her Request, the Prosecutor presents the progress of national proceedings in Georgia and the Russian Federation, and informs the Chamber that no other State has undertaken national proceedings with respect to the relevant crimes. The Chamber agrees with the Prosecutor's submission at paragraph 322 of the Request, that any proceedings undertaken by the de facto authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognized State."

331 Kovács, 2016, §§ 62-67, pp. 29-31.

332 Rome Statute Article 17 Issues of admissibility
1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (...)

20[333] refers primarily to prosecution by authorities of a 'State', subpoints of Article 17(1)(c) and Article 20(3)(b) may be rightly interpreted in a manner that the decisive factor consists of the 'reality' and the *rule of law* character of the prosecution and does not merely emerge from the fact that it is initiated by a *de jure* existing State.

In my view, the legal reasons are very close to the argument developed by the International Court of Justice in the advisory opinion on Namibia when it qualified South Africa's presence fully illegal and stated consequently that all administrative and other official documents issued by South Africa are without validity except for those which serve the population's interests and are necessary in a modern society (birth-, marriage-, schooling- or property certificates, etc.)[334].

In June 2022, one of the Pre-Trial Chambers issued three arrest warrants[335] concerning Mr Mindzayev[336], former minister of interior,

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333 Rome Statute Article 208 *Ne bis in idem*
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

334 International Court of Justice, 1971, § 125, p. 56.:
"125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international CO-operation. In particular,
while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

335 https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants (Downloaded in July 2022.)

336 International Criminal Court, Office of the Prosecutor, 2022c.

Mr Sanakoyev[337], former human rights commissioner of the so called 'Republic of South-Ossetia' and Mr Guchmazov[338]), commandant of the detention center of 'capital' Tskinvali.

Among them, Mr Mindzayev, born in North-Ossetia (belonging to the Russian Federation) and serving as minister of interior of South-Ossetia has only Russian citizenship, while Mr Guchmazov, should have Georgian nationality due to his birth in Georgia, most probably 'South-Ossetian' since the proclamation of the secession and also Russian, according to the Prosecutor's information.[339] For the same reasons, Mr Sanakoyev should have Georgian and South-Ossetian 'citizenships' but the Prosecutor had no actual information about an eventual Russian citizenship. However, according to different reports prepared under the auspices of different international organizations, and namely in the Council of Europe, the big majority of the population of South Ossetia, with regard to their intended entry into the Russian Federation, had already requested Russian citizenship, which was granted to them.[340]

The Prosecutor's request for an arrest warrant specified cruel, inhuman treatment of ethnic civilian Georgians arrested during street or road controls, apparently without any clear link to the hostilities. They were incarcerated in the Tskinvali detention centre and their liberation was subjected to an exchange of Russian soldiers (POW-s),

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337 International Criminal Court, Office of the Prosecutor, 2022d.

338 International Criminal Court, Office of the Prosecutor, 2022e.

339 According to the Eörsi-report (2006), about 90 % of the local population has also Russian citizenship. In 2002, the ration was already around 50 %. Implementation of Resolution 1415 (2005) on the honouring of obligations and commitments by Georgia, Doc. 10779, § 36. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11100&lang=EN (Accessed: July 2022) ; Situation in Georgia and the consequences for the stability of the Caucasus region, Doc. 9564, Lörcher-report, § 27. Available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9859&lang=EN (Accessed: July 2022)

340 See the Georgian law under: Organic Law of Georgia on Georgian Citizenship, available at: https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/99407/GEO-99407%20(EN).pdf (Accessed: July 2022) and https://www.ecoi.net/en/file/local/1175735/1226_1409300123_georgia-law-citizenship-2014-en.pdf (Accessed: July 2022)

some condemned Georgian officers and South-Ossetians kept in Georgian prisons.

Moreover, the end of the detention did not mean that they could return to their homes; they were forced to leave the South-Ossetian territory except for those who wanted to acquire the South-Ossetian 'citizenship'. On these grounds, the Prosecutor qualified these actions as crime of *hostage taking* and *illegal transfer of the population.*

On the basis of the submitted evidence and according to threshold of conviction required at this stage of the proceedings[341], the Pre-Trial Chamber granted the request and issued the arrest warrants. As most members of the international community – in conformity with the Stimson doctrine and the long list of General Assembly resolutions applying this approach – do not recognize South Ossetia as a

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341 Rome Statute Article 58 Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear (....)
1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
(b) The arrest of the person appears necessary:
(i) To ensure the person's appearance at trial;
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances
4. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient
to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. (...)

sovereign State, the jurisdiction of the International Criminal Court is based on *ratione loci*. Even if in case of Guchmazov and Sanakoyev, Georgian citizenship could also back the *ratione personae* approach, this did not play any role in the consideration due to the pre-eminence of the *ratione loci* principle. Similarly, neither Mr Mindzayev's and Mr Guchmazov's Russian citizenship, nor the South-Osssetian 'citizenship' did not affect the ICC's jurisdiction.

Not surprisingly, the South-Ossetian authorities rejected the ICC-jurisdiction at once, and they refused whatever form of cooperation with the International Criminal Court.[342] They repeated their position that they expressed in March 2022 immediately after the OTP press release about the submission of the request[343] had come out and which reflected the official standpoint of the Russian foreign ministry.[344]

## 4. THE QUESTION OF THE ICC JURISDICTION OVER MEMBERS OF THE AMERICAN ARMY IN THE SITUATION IN AFGHANISTAN

The conditions, circumstances and consequences of the American military attack and the two decade-long but finally unsuccessful occupation of Afghanistan, rightly accused of sheltering the Al-Kaïda movement responsible for the destruction of the World Trade Center in 2001, played most probably a very important role in the relationship between the ICC and the USA.

342 Decisions of the ICC on the territory of South Ossetia are illegitimate - MFA | Государственное информационное агентство "Рес". Available at: https://cominf.org/en/node/1166544489 (Accessed: July 2022)

343 21 March, 2022: 'Comment by the Ministry of Foreign Affairs of the Republic of South Ossetia on the request of the ICC Prosecutor to issue warrants for arrests of Mikhail Mindzaev, Hamlet Guchmazov and David Sanakoev'. Available at: https://mfa.rsogov.org/en/node/3564 (Accessed: July 2022); International Criminal Court, 2022t; International Criminal Court, 2022u; International Criminal Court, 2022v.

344 22 March 2022, 22:24: 'Comment by Foreign Ministry Spokeswoman Maria Zakharova on statements by International Criminal Court Prosecutor Karim Khan'. Available at: https://mid.ru/ru/foreign_policy/news/1805840/?lang=en (Accessed: July 2022)

It is true, however, that the roots of this delicate relationship go back the time of the Rome Diplomatic Conference where the very active and from some technical viewpoints highly constructive American delegation acting under the instructions of Bill Clinton and Madelaine Albright did not hide their criticism concerning the adopted text.

Having received plenty of materials and complaints about alleged war crimes and interrogation techniques running against the basic considerations of human rights by American armed forces and their 'private contractors' as well as about atrocities committed by members of the US backed Kabul government and of the evicted but returning Taliban forces, the Prosecutor decided to request authorization for a *proprio motu* investigation.[345]

Among the countries involved in the 'situation in Afghanistan', Afghanistan as well as Poland, Lithuania and Romania (countries allegedly offering some of their detention centres or military barracks for the purposes of interrogation and confinement[346]) are States Parties while the United States of America is not, moreover, George W. Bush (succeeding Bill Clinton) revoked the American signature of the Statute.

In these circumstances, the ICC jurisdiction over military or penitentiary staff of the first four countries could evidently be argued *ratione loci,* but the real question was undoubtedly whether the ICC enjoys jurisdiction over the American military and private people and if it does, how to proceed.

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345 International Criminal Court, 2017d. (In the followings: Prosecutor's request concerning the situation in Afghanistan, 2017).

346 Prosecutor's request concerning the situation in Afghanistan, 2017, § 49, pp. 28-29. See also: §§ 4, 203, 249, 329-335, 376, pp. 7, 99-100, 123, 161-164, 181.: "49. In addition, a limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Romania and Lithuania, which are all parties to the Statute. In particular, from 2002-2008, individuals allegedly participating in the armed conflict in Afghanistan, such as members of the Taliban or Al Qaeda, Hezb-e-Islami Gulbuddin and other militant groups, were allegedly transferred to clandestine CIA detention facilities located in those countries and are alleged to have been subjected to acts constituting crimes within the jurisdiction of the Court. Since such crimes were allegedly committed in the context of and associated with the armed conflict in Afghanistan, they are sufficiently linked to and fall within the parameters of the present situation."

The Prosecutor's request for authorization concerned the potential perpetrators belonging to all the five countries, however, the given Pre-Trial Chamber refused to grant it evoking the *'interests of justice'*[347] and presumed that it clearly follows from the statements and behaviour of different American authorities that no cooperation at all can be counted on.[348] If there is absolutely no chance of reaching trial stage at the ICC premises[349], it would be meaningless to launch an investigation with all the staffing, budgetary and administrative consequences.[350]

The Prosecutor appealed against this decision and the Appeals Chamber reversed it, but instead of ordering the Pre-Trial Chamber

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347 International Criminal Court, 2019h. (In the followings: Pre-Trial Chamber on the Request about the situation in Afghanistan, 2019).

348 Pre-Trial Chamber on the Request about the situation in Afghanistan, 2019, § 94, p. 30.:
"94. Second, subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future, whether in respect of investigations or of surrender of suspects; suffice it to say that nothing in the present conjuncture gives any reason to believe such cooperation can be taken for granted. Indeed, the Prosecution acknowledges the difficulties in securing albeit minimal cooperation from the relevant authorities as one of the reasons explaining the unusual duration of the preliminary examination. The Chamber has noted the Prosecution's submissions to the effect that even neutral, low-impact activities proved unfeasible. Accordingly, it seems reasonable to assume that these difficulties will prove even trickier in the context of an investigation proper."

349 Pre-Trial Chamber on the Request about the situation in Afghanistan, 2019, § 96, p. 31.:
"96. In summary, the Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited."

350 Pre-Trial Chamber on the Request about the situation in Afghanistan, 2019, § 96, p. 32.:
"DECIDES that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice and, accordingly, REJECTS THE REQUEST"

to revise its decision, the decision itself was changed and the appeal judges authorized the Prosecutor to investigate.[351]

They pointed out that even if the Rome Statute contains the reference to the *'interests of justice'*, it only applies to a context where a pre-trial chamber is entitled to double-check whether the prosecutor's refusal to investigate is rightly based on the 'interest of justice' if this reasoning was used in the prosecutor's decision.[352] However, there is no article in the Rome Statute which would empower the judges to refer *ex officio* to the *'interests of justice'* if this argument has not been mentioned by the Prosecutor.[353]

The Appeals Chamber highlighted that the Pre-Trial Chamber erred when it excluded the events occurred in the Lithuanian, Polish and Romanian detention centres offered to the US forces *ratione loci,* arguing that the victims of the torture-like interrogations were not arrested in Afghanistan but in other countries and even if they could be linked to the Taliban, the ICC does not have jurisdiction *ratione materiae* as these events would fall out of the material and geographical scope of the situation in Afghanistan.[354]

As it is well known, some days after the withdrawal of the US forces in August 2021, the local regime backed by them totally collapsed and the Taliban came back to power in Kabul and in a great part of the territory. Their authority was however soon challenged by a local branch of the ISIS, the so-called *Islamic State – Khorasan Province* (IS-K) not recognizing them and performing terrorist attacks. The

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351 International Criminal Court, Office of the Prosecutor, 2020d, § 79, p. 34.: "79. In sum, the Appeals Chamber considers it appropriate to amend the Impugned Decision to the effect that the Prosecutor is authorised to commence an investigation 'in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002'".
(In the followings: Appels Chamber about the situation in Afghanistan, 2020)

352 See: Rome Statute Article 53(1)(c) and (2)(c), cited below.

353 Appels Chamber about the situation in Afghanistan, 2020, § 45, pp. 20-21.

354 Appels Chamber about the situation in Afghanistan, 2020, §§ 73, 76, pp. 32-34. See also: Pre-Trial Chamber on the Request about the situation in Afghanistan, 2019, § 53, pp. 18-19.

Taliban are not recognized by the United Nations and most[355] of their member States as official, *de jure* government and the current relations are restricted to humanitarian relief to the suffering population.

Taking into account these circumstances, Karim Khan, the new Prosecutor, asked the Pre-Trial Chamber to authorize him to concentrate on the crimes committed by the Taliban and the 'Islamic State – Khorasan Province' – not forgetting but de-prioritizing the investigation over other aspects of the conflict.[356] The Pre-Trial Chamber had doubts whether IS-K can be considered as a participant of the conflict already falling under the previous authorization but the Appeals Chamber shared the Prosecutor's view in the matter.[357]

## 5. PROCEEDINGS CONCERNING ISRAEL: THE FLOTTILA CASE AND THE QUESTION OF THE ICC'S JURISDICTION OVER THE 'SITUATION IN PALESTINE' AND THE SITUATION IN GAZA (PALESTINE)

Israel, whose signature was not followed by ratification, was involved in three proceedings.

### 5.1. The Flottila case

The first was related to the situation around the Gaza strip, belonging formally to the Palestinian Authority established by virtue

355 However Russia, China, Iran, India, Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan had high level talks in Moscow with the representatives of the Talib government and issued a common declaration emphasizing "that further practical engagement with Afghanistan needed to take into account the new reality, that is the Taliban coming to power in the country, irrespective of the official recognition of the new Afghan government by the international community." Joint Statement of the Participants in the Moscow Format Consultations on Afghanistan, Moscow, 20 October 2021. Available at: https://www.mid.ru/ru/foreign_policy/international_safety/1784139/?lang=en (Accessed: July 2022)

356 International Criminal Court, 2021l; *See also*: International Criminal Court, 2022w; International Criminal Court, 2022x; International Criminal Court, 2022y; International Criminal Court, 2021v.

357 International Criminal Court, 2023j, § 60, p. 19.

of the 1993/1995 Oslo agreements but led by the extremist Hamas organization not recognizing the legitimacy of President Mahmoud Abbas and the government appointed by him following *grosso modo* the orientation of the late Yasser Arafat's Palestine Liberation Organization.

In order to prevent the importation of warfare materials into Gaza, Israel imposed a naval blockade at the Mediterranean Sea and the restrictions and a thorough double-check were practised at cca 125 km distance from the shore, i.e. a space much larger than territorial sea and contiguous zone as defined in the UNCLOS treaty. The so-called Mavi Marmara incident or Flottilla case of May 31, 2010, emerged from an attempt to break the blockade. It was carried out mostly by Turkish NGO activists on board of several steamships navigating under different flags: the originally Turkish Mavi Marmara was suddenly registered as a ship under Comoros's flag some days before the attempt while the other, much smaller ships possessed Hellenic or Cambodian registration.

The Israeli Navy stopped and seized the Mavi Marmara not obeying the order to stop. During the commando operation, ten activists died (nine Turks and one US/Turkish double national) and a good number were heavily wounded, mostly on the activists' side but also on Israeli side.

Following Comoros's referral, the Prosecutor concluded – on the basis of the already cited Article 12(2)(a) – that the ICC enjoys jurisdiction according to the flag state principle (*loi du pavillon*), which points out to Comoros, a State Party. (Greece and Cambodia are also States Parties but they wanted to be out of the procedure and because their steamships obeyed the instructions of the Israeli Navy and the passengers did not enter into a combat situation with the Israelis.) Nevertheless, the Prosecutor stated that the *gravity* criterion[358] is not met and she did not open an investigation.

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358 Rome Statute Article 17 Issues of admissibility
1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (...)
(d) The case is not of sufficient gravity to justify further action by the Court.

Comoros contested the Prosecutor's decision and upon a special relief procedure[359] stipulated by the Rome Statute, a long litigation opened between the Prosecutor and the Pre-Trial Chamber about the material and procedural requirements of the assessment and the proof of gravity and about the institutional competences of the concerned ICC institutions i.e. the OTP, the Pre-Trial Chamber and the Appeals

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359 Rome Statute Article 53 Initiation of an investigation
1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
(b) The case is inadmissible under article 17; or
(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.
3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2.
(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Chamber. At the end, the Prosecutor maintained that she would not open an investigation in a situation which is not sufficiently grave.[360]

## 5.2. The question of the ICC's jurisdiction over the 'situation in Palestine'

The second procedure was initiated by the Palestinian Authority. Within the limits of this article there is no space to give an in-depth presentation of Palestine's status in international law, so let me only enumerate the most important legal coordinates: *i.* according to the Oslo agreements (1993, 1995), the Palestinian Authority has been established and enjoys competences of self-government on the territory occupied by Israel; *ii.* the Palestinian Authority is since 2012 a 'non-member observer state' in the United Nations' Organization[361]; *iii.* the Palestinian Authority is recognized by circa two-third of the United Nations as a sovereign State; *iv.* but it is not recognized by Israel, the USA and most countries of the European Union as an already existing, *de jure* sovereign State; *v.* it was however granted full membership in several intergovernmental organizations (e.g. Unesco, Interpol); *vi.* and joined also the International Criminal Court due to construction of the 'all states' formula within the Rome Statute[362] and is, therefore,

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360 See the most important decisions: International Ciminal Court, 2017a; International Criminal Court, 2019i; International Criminal Court, 2020h; International Criminal Court, 2018f; International Criminal Court, 2015e.

361 United Nations General Assembly resolution 67/19, available at: https://www.un.org/unispal/document/auto-insert-182149/ (Accessed: July 2022)

362 Rome Statute Article 125 Signature, ratification, acceptance, approval or accession
1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

State Party; *vii.* the ICC's competence over aggression could enter into force due to the Palestinian Authority as theirs was the thirtieth instrument of ratification of the Kampala Agreement.

Already years before their becoming a State Party, the Palestinian Authority launched an intensive campaign in order to initiate a procedure at the ICC over events and alleged war crimes linked with the Israeli occupation. It repeated this after its entry into the ICC but the *ratione temporis* formula enshrined in its referral *de facto* excluded the investigation over certain crimes committed allegedly by Palestinians against young Israelis having provoked large scale upset and shock.

Mrs Bensouda was ready to investigate and not only concerning the Israeli actions referred to by Palestinians but also the crimes which were committed against Israelis by Palestinians. Nevertheless – as she had done it in the Rohingya proceedings - she asked a Pre-Trial Chamber for a 'preliminary ruling' to decide whether she has the right to say that taking into account Palestine's State Party status, the ICC's jurisdiction covers the Gaza Strip and the West Bank i.e. territories falling *de facto* or *de jure* under the administration of the Palestinian Authority?

In short, the issue was whether the ICC enjoys competence *ratione loci* concerning persons belonging to Israel, a non-State Party or to Palestine, a State Party which uses the name 'State of Palestine' in most of its international connections and also within the International Criminal Court. In case of an affirmative answer, what are the precise territorial dimensions of the jurisdiction? The answer depends essentially on the interpretation of the formula in Article 12(2)(a) ("*The State on the territory of which the conduct in question occurred* (...)"), i.e. *i.* whether here, the word 'State' means a *sovereign State* or simply a *State Party* and *ii.* whether under 'territory' a *State-territory* is to be understood or only a geographical dimension which is considered by the State Party within the ICC as its own?

The decision of the Pre-Trial Chamber taken by majority[363] - to which I appended a lengthy dissenting opinion [364] which had a

363 International Criminal Court, 2021p. (In the following: ICC, Palestine decision, 2021.

364 See: Kovács, 2021; Dinstein, Lahav, 2021.

considerable political and scholarly echo - concluded that, it can be stated that the Prosecutor's standpoint is substantiated at the stage of investigation without passing a decision on the issue whether Palestine is a sovereign State, even if the territorial dimensions can be reevaluated in the future procedural stages.[365]

Following the decision, the Prosecutor Fatou Bensouda communicated the opening of investigations.[366]

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365 ICC, Palestine decision, 2021, §§ 60, 130-131, pp. 29, 58-60.
"60. As such, it must be emphasised that the present decision is strictly limited to the question of jurisdiction set forth in the Prosecutor's Request and does not entail any determination on the border disputes between Palestine and Israel. The present decision shall thus not be construed as determining, prejudicing, impacting on, or otherwise affecting any other legal matter arising from the events in the Situation in Palestine either under the Statute or any other field of international law.
(...)
130. As a final matter, the Chamber finds it appropriate to underline that its conclusions in this decision are limited to defining the territorial parameters of the Prosecutor's investigation in accordance with the Statute. The Court's ruling is, as noted above, without prejudice to any matters of international law arising from the events in the Situation in Palestine that do not fall within the Court's jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Court is neither adjudicating a border dispute under international law nor prejudging the question of any future borders.
131. It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time."
"For these reasons, the Chamber hereby Finds, that Palestine is a State Party to the Statute; Finds, by majority, Judge Kovács dissenting, that, as a consequence, Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a) of the Statute; and Finds, by majority, Judge Kovács dissenting, that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem."

366 International Criminal Court, 2021j.

## 5.3. The situation in Gaza (Palestine)

It may not be surprising that in November 2023, high representatives of several Muslim non-States Parties called on the International Criminal Court to act and to investigate war crimes allegedly committed by Israeli Defence Forces during their military attacks against Hamas forces in Gaza. As you will know, these attacks were ordered by the Israeli government emphasizing the legitimate self-defence motivation following the horrific terrorist acts and hostage takings of October 7, 2023, which were committed against inhabitants of neighbouring kibbutzes and were firmly condemned by Prosecutor Karim Khan[367]

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367 International Criminal Court, 2023k:
"But we have watched with horror the pictures emerging from Israel on the 7th of October. I think any of us that are parents or have children, any of us that have families, any of us that are alive, any of us that have love of God or love of humanity in our heart could not have helped feel their hearts chill on hearing the various accounts that came from so many innocent civilians in Israel whose lives were torn apart on that fateful day. And we simply cannot live in a world, we cannot leave a world for our children where burnings and executions and rapes and killings can take place as if they are normal, as if they are to be tolerated, as if they can happen without consequence. Children and men and women and the elderly can't be ripped from their homes and taken as hostages, whatever the reasons. And when these types of acts take place, they cannot go uninvestigated and they cannot go unpunished. Because these types of crimes that we've all been watching, that we saw on the 7th of October, are serious violations, if proven, of international humanitarian law. And one can't watch videos of innocent Israelis being hunted down on a Saturday morning at a party and not pause to think for a moment at the hatred and the cruelty that underpinned those attacks. These acts that we saw on the 7th of October are not acts that accord with our humanity. They are acts that are repugnant to any person that believes in God. They're the most un-Islamic acts and cannot be committed in the name of a religion whose very name is peace. As I stated five days after the attacks that took place on the 7th of October, we have jurisdiction over crimes committed by the nationals of state parties. And therefore that jurisdiction continues over any Rome Statute crimes committed by Palestinian nationals or the nationals of any state parties on Israeli territory, if that is proven. And whilst Israel is not a member of the ICC, I stand ready to work with state parties and non-state parties alike in pursuit of accountability. My primary and indeed my only objective must be to achieve justice for the victims and to uphold my own solemn declaration under the Rome Statute as an independent prosecutor, impartially looking at the evidence and vindicating the rights of victims whether they are in Israel or Palestine."

who underlined his determination to follow the situation closely.[368]

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368 International Criminal Court, 2023l:
"On 17 November 2023, my Office received a referral of the Situation in the State of Palestine, from the following five States Parties: South Africa, Bangladesh, Bolivia (Plurinational State of), Comoros, and Djibouti.
In accordance with the Rome Statute of the International Criminal Court, a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. In receiving the referral, my Office confirms that it is presently conducting an investigation into the Situation in the State of Palestine. This investigation, commenced on 3 March 2021, encompasses conduct that may amount to Rome Statute crimes committed since 13 June 2014 in Gaza and the West Bank, including East Jerusalem. It is ongoing and extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023.
In accordance with the Rome Statute, my Office has jurisdiction over crimes committed on the territory of a State Party and with respect to the nationals of States Parties. Upon the commencement of my mandate in June 2021, I put in place for the first time a dedicated team to advance the investigation in relation to the Situation in the State of Palestine. As I stated in my recent visit to Rafah Crossing, pursuant to its mandate, this Unified Team is moving with focus in collecting, preserving and analysing information and communications from key stakeholders in relation to relevant incidents. The Office has collected a significant volume of information and evidence, including through submissions received via OTP Link, our secure platform to receive submissions. I continue to encourage all those with relevant information to contact my Office. My Office will continue its engagement with all relevant actors, whether national authorities, civil society, survivor groups or international partners, to advance this investigation. I will also continue my efforts to visit the State of Palestine and Israel in order to meet with survivors, hear from civil society organisations and engage with relevant national counterparts. I stand ready to work with all parties, including to complement domestic accountability efforts, in order to ensure that justice is delivered for those affected by Rome Statute crimes. I call upon all relevant actors to provide full cooperation with my Office. I also call on all States Parties to the Rome Statute to provide us with the tools we need in order to allow us to effectively fulfil our mandate, across situations. The upcoming Assembly of States Parties in December will be an important moment to demonstrate, at this critical time globally, that the political commitment of States to the principles of the Rome Statute is matched with a commitment to meet the resource needs that my Office has clearly and repeatedly expressed."

As Karim Khan stated, five States Parties, i.e., South Africa, Bangladesh, Bolivia, Comoros and Djibouti submitted a referral to the Prosecutor concerning the military operations in Gaza.

However, *prior* or *posterior* to this referral, high representatives of non-States Parties also asked for the involvement of the ICC. They are the following (in alphabetic order of their respective countries): Algeria's President Abdelmadjid Tebboune[369], Indonesia's President Joko Jokowi Widodo[370], Iran's foreign minister Hossein Amir Abdollahian[371], Libya's ambassador to the United Nations, Taher El Sonni[372], Malaysian Prime Minister

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369 "Algeria calls on ICC to hold Israel accountable for its crimes in Gaza". Available at: https://www.middleeastmonitor.com/20231107-algeria-calls-on-icc-to-hold-israel-accountable-for-its-crimes-in-gaza/ (Accessed: December 2023).

370 "Indonesia, Türkiye Continue to Join Hands to Help Palestine (...) President Jokowi emphasized that Indonesia will use all channels, including the UN General Assembly, Human Rights Council and the International Criminal Court to voice justice and humanity for the Palestinian people. (...)" Available at: https://setkab.go.id/en/indonesia-turkiye-continue-to-join-hands-to-help-palestine/ (Accessed: December 2023).

371 "Iran's FM Writes Letter to ICC, Calls for Prosecution of Israeli Authorities for Crimes in Gaza". Available at: https://www.farsnews.ir/en/news/14020908000495/Iran's-FM-Wries-Leer-ICC-Calls-fr-Prsecin-f-Israeli-Ahriies-fr (Accessed: December 2023) ; "Iran FM urges ICC to prosecute Zionist regime officials". Available at: https://en.mfa.ir/portal/newsview/735012/Iran-FM-urges-ICC-to-prosecute-Zionist-regime-officials (Accessed: December 2023) ; "Iran Accuses US of Greenlighting Israel's Attacks Against Palestinian". Available at: https://www.farsnews.ir/en/news/14020913000337/Iran-Accses-US-f-Greenlighing-Israel%E2%80%99s-Aacks-Agains-Palesinians-in (Accessed: December 2023) ; "Iranian FM Calls for Prosecution of Israeli Officials over War Crimes in Gaza". Available at: https://www.farsnews.ir/en/news/14020915000353/Iranian-FM-Calls-fr-Prsecin-f-Israeli-Officials-ver-War-Crimes-in-Gaza (Accessed: December 2023) ; "Kanaani: Most of Iran's Proposals Incorporated into OIC Summit Resolution in Riyadh". Available at: https://en.mfa.ir/portal/newsview/733728/Kanaani-Most-of-Iran%E2%80%99s-proposals-incorporated-into-OIC-summit-resolution-in-Riyadh (Accessed: December 2023).

372 Abdulkaderassad, 2023:
"(...) El Sonni said during his meeting with the ICC Prosecutor, Karim Khan, that the ICC's role is to support the Attorney General's Office in investigations, not to act as a substitute for it. El Sonni and Khan reviewed the work strategy of the ICC in order to complete the ongoing investigations in Libya as per the mandate granted to the ICC and its efforts to present the results as soon as possible. Meanwhile, El Sonni stressed the need for the ICC to pursue those

Datuk Seri Anwar Ibrahim [373], Qatar's ambassador to The Netherlands, Mutlaq bin Majid Al Qahtani[374], Pakistan's Foreign Office spokesperson Mumtaz Zahra Baloch[375] and Turkey's President Recep Tayyip Erdogan[376].

Oman's foreign ministry issued a similar statement[377] as well as Qatar. However, Qatar's statement does not indicate it clearly whether

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involved in the Israeli occupation's genocide crimes against the Palestinians in the Gaza Strip as quickly as possible."

373 Rahim, Gimino, Yusof, 2023.

374 Thursday, Nov 02, 2023: Ambassador of Qatar to the Netherlands Meets ICC Prosecutor. Available at: https://mofa.gov.qa/en/all-mofa-news/details/1445/04/18/ambassador-of-qatar-to-the-netherlands-meets-icc-prosecutor (Accessed: December 2023) ; *see also*: "Qatar welcomes ICC decision of inclusion of Occupied Palestinian territories with its jurisdiction". Available at: https://www.gulf-times.com/story/685443/qatar-welcomes-icc-decision-of-inclusion-of-occupied-palestinian-territories-with-its-jurisdiction (Accessed: December 2023).

375 "Pakistan urges UN to stop Israeli aggression". Available at: https://www.nation.com.pk/17-Nov-2023/pakistan-urges-un-to-stop-israeli-aggression (Accessed: December 2023).

376 "Israeli gov't should stand trial at ICC: Turkish president". Available at: https://www.aa.com.tr/en/middle-east/israeli-gov-t-should-stand-trial-at-icc-turkish-president/3057902 (Accessed: December 2023); "Erdogan blasts Israeli war crimes as Turkish lawyers refer evidence to ICC". Available at: https://www.presstv.ir/Detail/2023/11/25/715252/Erdogan-blasts-Israeli-war-crimes-as-Turkish-MPs-refer-evidence-to-ICC (Accessed: December 2023) ; "Turkish president calls on ICC to hold 'butchers of Gaza' accountable, particularly Netanyahu". Available at: https://www.aa.com.tr/en/politics/turkish-president-calls-on-icc-to-hold-butchers-of-gaza-accountable-particularly-netanyahu/3071126#! (Accessed: December 2023) ; "Erdogan insists that Netanyahu must be charged by ICC". Available at: https://menafn.com/1107536502/Erdogan-insists-that-Netanyahu-must-be-charged-by-ICC (Accessed: December 2023) ; "PG leaders, Erdogan call for end to Israel aggression on Gaza". Available at: https://en.mehrnews.com/news/209217/PG-leaders-Erdogan-call-for-end-to-Israel-aggression-on-Gaza (Accessed: December 2023)

377 "Oman calls for international court to investigate 'war crimes' by Israel in Gaza". Available at: https://www.middleeastmonitor.com/20231104-oman-calls-for-international-court-to-investigate-war-crimes-by-israel-in-gaza/ ; "Oman condemns continued massacres and war crimes by Israeli occupation forces". Available at: https://fm.gov.om/oman-condemns-continued-massacres-and-war-crimes-by-israeli-occupation-forces/ (Accessed: December 2023) ; "Oman calls on ICC to investigate Israeli 'war crimes' in Gaza". Available at: https://www.presstv.ir/Detail/2023/11/04/714010/Palestine-Israeli-war-

the aim is the intervention of the ICC as such or only an independent investigation.[378]

Several regional inter-state cooperation formations embracing mostly states predominantly with Muslim population – only a few[379] of them being ICC States parties – also emphasized the ICC's role in the matter, namely the Organization of Islamic Cooperation[380], the Joint Arab and Islamic Summit[381] (2023), the Ligue of Arab States[382] and

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crimes-Gaza-Strip-massacre-Palestinians-Oman-Foreign-ministry-urge-ICC-probe- (Accessed: December 2023).

378 "Qatar calls for international probe into 'Israeli crimes' in Gaza". Available at: https://www.aljazeera.com/news/2023/12/3/qatar-calls-for-international-probe-into-israeli-crimes-in-gaza (Accessed: December 2023) ; "Qatar's prime minister calls for international investigation into 'Israeli crimes in Gaza'". Available at: https://bnn.network/politics/qatars-prime-minister-calls-for-international-investigation-into-israeli-crimes-in-gaza/ ; (Accessed: December 2023).

379 Bangladesh, Djibouti, Jordan, Tunisia

380 See 'Kanaani: Most of Iran's proposals incorporated into OIC summit resolution in Riyadh'. Available at: https://en.mfa.ir/portal/newsview/733728/Kanaani-Most-of-Iran%E2%80%99s-proposals-incorporated-into-OIC-summit-resolution-in-Riyadh (Accessed: December 2023); See also from 2023: "OIC Condemns the Continuation of Israeli War Crimes of Jenin and its Camp, and Calls on the UN Secretary-General to Implement Measures to Protect Palestinian Civilians. Date: 04/07/2023 (...) OIC called on the International Criminal Court to fulfill its responsibilities with regard to working to complete the criminal investigation into the war crimes that Israel has committed on the Palestinian people and urged the Secretary-General of the United Nations to implement practical and effective measures to protect Palestinian civilians. (...)" Available at: https://www.oic-oci.org/topic/?t_id=39189&t_ref=26501&lan=en (Accessed: December 2023).
See from 2020: International Criminal Court, 2020i: OIC Welcomes the Report of the Prosecutor of the ICC Confirming its Jurisdiction over the Occupied Palestinian Territory; The OIC as an *amicus curiae* submitted a position paper during the procedure of the 'Situation in Palestine'.

381 See: 'Joint Arab and Islamic Summit Concludes and Demands End to Israeli Aggression, Breaking of Israeli Siege on the Gaza Strip and Prosecution of Israel for its Crimes'. Available at: https://www.oic-oci.org/topic/?t_id=39923&t_ref=26755&lan=en (Accessed: December 2023)

382 See: 'President El-Sisi Participates in a High-Level Conference to Support Jerusalem'. Available at: https://www.sis.gov.eg/Story/177555/President-El-Sisi-Participates-in-a-High-Level-Conference-to-Support-Jerusalem?lang=en-us (Accessed: December 2023); Kuttab, 2023 ; Kandil, 2023; 'Arab Group asks ICC prosecutor to visit Gaza as soon as possible'.

the Arab Parliament[383].

Without entering into the merits of the issue and the follow up of the referral submitted by five States Parties, it is important to point out that these non-States Parties also rely on the ICC and they hope that it will play a crucial role in the fight against impunity.

Although it is not an action launched by a State, it worths adding that families of Israeli victims also petitioned the ICC to investigate about crimes committed by Hamas on October 7.[384]

Although not acting in his investigative capacity, Karim Khan visited survivors and victims' families on November 30, 2023 in Israel, which is a first-time initiative on behalf of an ICC Prosecutor. [385]

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Available at: http://www.china.org.cn/world/Off_the_Wire/2023-12/07/content_116863027.htm (Accessed: December 2023).
See also from 2021: 'Arab League Council urges International Criminal Court to open criminal investigation into Israeli war crimes'. Available at: https://english.wafa.ps/Pages/Details/128358 (Accessed: December 2023);
Kasraoui, 2021: "(...) The Arab foreign ministers also called on the International Criminal Court (ICC) to proceed with a criminal investigation into apartheid, war crimes, and crimes against humanity committed by Israelis against the Palestinian people. The illegal, forced eviction of Palestinians from their homes in the Sheikh Jarrah neighborhood and the rest of the occupied Palestinian territories and neighborhoods should also be investigated, argued the ministers. They concluded by urging the ICC to provide all material and human resources for the investigation and to give it the necessary priority.";
International Criminal Court, 2018g; and of the 'Situation in Palestine' see International Criminal Court, 2020j.

383 See: 'Arab Parliament to Submit Complaint to ICC to Investigate Israeli War Crimes Against Palestinians'. Availabe at: https://www.spa.gov.sa/en/N2002032 (Accessed: December 2023); Raafat, 2023.

384 'Israeli families bring war crime, genocide complaint against Hamas to ICC'. Available at: https://www.timesofisrael.com/liveblog_entry/israeli-families-bring-war-crime-genocide-complaint-against-hamas-to-icc/ (Accessed: December 2023)

385 'International Cirminal Court Prosecutor Visits Israel'. Available at: https://www.voanews.com/a/international-criminal-court-prosecutor-visits-israel/7379126.html (Accessed: December 2023):
"International Criminal Court Prosecutor Karim Khan visited Israel "at the request and invitation" of the survivors and families of the victims of Hamas' October 7 attacks, the ICC said on Thursday. "The visit, while not investigative in nature, represents an important opportunity to express sympathy for all victims and engage in dialogue," the court wrote on X, formerly Twitter. Khan is also to travel to Ramallah in the occupied West Bank, where he will meet with senior

## 6. UKRAINE AND THE ICC[386]

The public following the activity of the International Criminal Court is obviously interested in the current and future involvement of the ICC in the prosecution of crimes committed during the war in Ukraine.

As to 2023, Ukraine is not a State Party but it gave its consent to the ICC as early as in 2014 regarding the jurisdiction over the brutal repression of the Maidan place protests in Kyiv[387] and in 2015, the consent was extended to the whole territory concerning all the crimes falling under the Rome State and committed since February 2014.[388]

Shortly after the beginning of the Russian military attacks, the Prosecutor submitted a request for authorization to investigate *proprio motu*. While the *proprio motu* investigation belongs to the Prosecutor's prerogatives vis-à-vis States Parties, the question was whether *mutatis mutandis* this principle can also be applied in case of the consent of a non-State Party.

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Palestinian officials, the ICC said. Hamas militants took about 240 captives from southern Israel during an unprecedented October 7 attack that Israeli officials say killed around 1,200 people, most of them civilians. In response, Israel has vowed to eliminate Hamas, an Islamist movement with an armed wing. A relentless Israeli air, sea and ground offensive has killed more than 15,000 people, according to Gaza's Hamas rulers. A weeklong truce that has paused weeks of deadly conflict is set to expire early Friday. Since its inception in 2002, the ICC has been the world's only independent court set up to investigate the gravest offenses including genocide, war crimes and crimes against humanity. It opened an investigation into Israel as well as Hamas and other armed Palestinian groups for possible war crimes in the Palestinian territories in 2021. Khan has previously said this investigation now "extends to the escalation of hostilities and violence since the attacks that took place on October 2023." ICC teams have not been able to enter Gaza or investigate in Israel, which is not an ICC member. Legal experts have told AFP that Hamas and Israel could face war crimes charges over the conflict. Five countries in mid-November called for an ICC investigation into the Israel-Hamas war, with Khan saying his team had collected a "significant volume" of evidence on "relevant incidents."
See also: 'ICC Prosecutor to Visit Israel at Request of Oct. 7 Hamas Attack Victims'. Available at: https://www.usnews.com/news/world/articles/2023-11-30/icc-prosecutor-to-visit-israel-at-request-of-oct-7-hamas-attack-victims (Accessed: December 2023) ; Bob, 2023.

386 International Criminal Court, 2022a.

387 International Criminal Court, 2014c.

388 International Criminal Court, 2015f.

However, a few days later, 39 States Parties submitted a common referral on the situation in Ukraine to the Prosecutor[389]. They were later joined by a few other States Parties. In consequence, the previously mentioned request became obsolete, and Karim Khan communicated the initiation of an investigation.[390]

The ICC's jurisdiction is based on the *ratione loci* principle over people belonging to the Russian or to the Ukrainian armed and other forces, both countries for the time being non-States Parties. Moreover, it can also be established on the *ratione personae* principle concerning nationals of Ukraine (a consenting non-State Party) or of whatever States Parties for crimes committed during the armed conflict.

In 2022, the Pre-Trial Chamber II granted the Prosecutor's request for arrest warrants for alleged perpetrators of unlawful transfer or deportation. As it is well known, the arrest warrants concern president Mr Vladimir Putin and the ombudsperson for children, Mrs Maria Lvova-Belova. For the time being, the only publicly accessible documents of the ICC are the press-releases issued on the decision[391]

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389 International Criminal Court, 2022z.

390 International Criminal Court, 2022e.

391 International Criminal Court, 2023b:
"Today, 17 March 2023, Pre-Trial Chamber II of the International Criminal Court ("ICC" or "the Court") issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova.
Mr Vladimir Vladimirovich Putin, born on 7 October 1952, President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Mr Putin bears individual criminal responsibility for the aforementioned crimes, (i) for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute).
Ms Maria Alekseyevna Lvova-Belova, born on 25 October 1984, Commissioner for Children's Rights in the Office of the President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population

followed by the Prosecutor's statement[392] and a video message of the

(children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Ms Lvova-Belova bears individual criminal responsibility for the aforementioned crimes, for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute).

Pre-Trial Chamber II considered, based on the Prosecution's applications of 22 February 2023, that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.

The Chamber considered that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the Chamber considered that it is in the interests of justice to authorise the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber. The abovementioned warrants of arrests were issued pursuant to the applications submitted by the Prosecution on 22 February 2023."

392 International Criminal Court, 2023c:

"(...) Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children's care homes. Many of these children, we allege, have since been given for adoption in the Russian Federation. The law was changed in the Russian Federation, through Presidential decrees issued by President Putin, to expedite the conferral of Russian citizenship, making it easier for them to be adopted by Russian families. My Office alleges that these acts, amongst others, demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian children were protected persons under the Fourth Geneva Convention. We also underlined in our application that most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014. In September last year, I addressed the United Nations Security Council and emphasised that the investigation of alleged illegal deportation of children from Ukraine was a priority for my Office. The human impact of these crimes was also made clear during my most recent visit to Ukraine. While there, I visited one of the care homes from which children were allegedly taken, close to the current frontlines of the conflict. The accounts of those who had cared for these children, and their fears as to what had become of them, underlined

ICC President.[393]

The activity of the International Criminal Court in Ukraine is strengthened by different forms of interstate and inter-organisational cooperation[394].

## 7. PRESENTING FACTS OCCURRED IN A NON-STATE PARTY IF THIS IS RELEVANT FOR A CASE OR A SITUATION ON THE TABLE

It might happen that even if the ICC does not have jurisdiction either *ratione loci* or *ratione personae* concerning a situation or a case linked with a non-State Party, another case under investigation or trial involves the overview of the events occurred in that given non-State Party.

Bosco Ntaganda's trial is a good example. Born originally in Rwanda and survivor of the genocide against the Tutsis, Mr Ntaganda became later chief of staff and deputy to Mr Thomas Lobanga Dyilo, commandant of a Congolese Hema armed militia (UPC/FPLC)[395]. It should be noted that the Hema community in the Ituri province of Congo (DRC) is linguistically and ethnically very close to the Tutsis, while the Lendu and Ngiti communities are close to the Hutus in Rwanda. Simplifying the history of the bloody civil war broken out from inter-ethnic conflicts, it can be said that the events in Ituri were the closing scene of the Rwandan tragedy.

It is thus worth giving a specific look from this point of view to the first and second instance judgments pronounced in the case The Prosecutor v. Bosco Ntaganda where Rwanda, a non- State Party is often mentioned, either concerning its role in providing the Hema militias

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the urgent need for action. We must ensure that those responsible for alleged crimes are held accountable and that children are returned to their families and communities. As I stated at the time, we cannot allow children to be treated as if they are the spoils of war. (...)"

393 President Hofmanski's speech is attached at the end of the press release cited *supra*.

394 European Union Agency for Criminal Justice Cooperation, no date1 ; European Union Agency for Criminal Justice Cooperation, no date2.

395 UPC: Union des Patriotes Congolais. FPLC: Forces Patriotiques pour la Libération du Congo.

with arms or whether Bosco Ntaganda's personal memories and experiences should be taken into account as a mitigating factor during the assessment of liability.[396]

## 8. COOPERATION OF NON-STATES PARTIES WITH THE ICC

When speaking of a case chosen from a UNSC referred situation, the obligation of cooperation of a non-State party is theoretically standing from its UN membership and the *erga omnes* legal nature of the resolution adopted 'under Chapter VII'. However, the real issue is whether all the five permanent members are ready to sanction *in concreto* the given UN member state, non-Sate party to the Rome Statute...

It goes without saying that a non-State Party can enter into cooperation with the ICC at any time it wishes.[397]

Another, special legal background can be the so called 'ICC articles', often enshrined in the cooperation agreements contracted by the European Union with African, Caribbean and Pacific States. (Cotonou agreements).[398] For example, the EU - Indonesia agreement also contains such a disposition even if Indonesia is a non-State Party.[399]

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396 International Criminal Court, 2019j, see: §§ 1, 5-14, 16, 259, 340, 358, 728-730, pp. 10-11, 14, 113, 151, 158, 349-351.; International Criminal Court, 2019k, see: §§ 200, 209-210, pp. 90, 94-95.; International Criminal Court, 2021q, see: §§ 606, 660, pp. 213, 233.

397 Rome Statute, Article 87 Requests for cooperation: general provisions (...)
(4) (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

398 Kovács, 2020, pp. 311-326.

399 Council of the European Union, 2014:
Article 4 Legal cooperation (...) 3. The Parties agree to cooperate on the implementation of the Presidential Decree on the National Plan of Action of Human Rights 2004-2009, including preparations for the ratification and implementation of international human rights instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide, and the Rome Statute on the International Criminal Court.

There are numerous examples of the cooperation between the ICC and non-States Parties realising that this is in their own interest.

The OTP request for authorization of an investigation in the situation in Georgia (2015) reveals that Russia transmitted a considerable amount of evidence to the ICC.[400] It is true however that it concerned only crimes where the victims were Russians, and the alleged perpetrators could be considered Georgians. Russia stopped the cooperation after the Pre-Trial Chamber authorized the Prosecutor to investigate in all the three directions, i.e. regarding Russian, ethnic South Ossetian and ethnic Georgian perpetrators in accordance with the request.[401] The extension of the Ukrainian consent to the ICC's jurisdiction over the whole Ukrainian territory was another reason of the split between the ICC and Russia declaring the withdrawal of its signature of the Rome Statute.[402]

As to the Ukrainian situation, Russia refused whatever cooperation with the International Criminal Court and when the arrest warrants were issued against President Putin and Mrs Lvova-Belova, Russian authorities initiated investigations against the Prosecutor and the judges of the given Pre-Trial Chamber and put presiding judge Rosario Aitala on the 'wanted list'.[403]

The relationship between the International Criminal Court and the USA is quite billowy[404]: there were periods – mostly under Republican presidents – when the administration was hostile and tried to

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400 International Criminal Court, 2015g, §§ 6, 8, 46, pp.6-8, 29.

401 International Criminal Court, 2016d.

402 'Распоряжение Президента Российской Федерации от 16.11.2016 № 361-рп "О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда"'. Available at: http://publication.pravo.gov.ru/Document/View/0001201611160018 (Accessed: July 2022); Sayapin, 2016.

403 'Russia puts ICC Judge Aitala, who issued arrest warrant for Putin, on its wanted list'. Available at: https://tass.com/politics/1636783 (Accessed: December 2023)

404 'The US-ICC Relationship'. Available at: https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (Accessed: July 2022); 'The United States and International Criminal Justice: A complex and challenging relationship'. Available at: https://www.pgaction.org/ilhr/rome-statute/united-states-and-international-criminal-justice.html (Accessed: July 2022)

hamper[405] the cooperation of other States with the ICC as well, and even introduced *in personam* sanctions against the Prosecutor Fatou Bensouda and one of her closest collaborators, Phakiso Mochochoko. On the other hand, the negotiations and the signature occurred under the Democratic establishment (Bill Clinton), some ICC wanted people (Dominic Ongwen[406] and Bosco Ntaganda[407]) were arrested and transferred to The Hague by American diplomatic and security services involved also in the hunt against Joseph Kony[408], leader of the so called Lord's Resistance Army. The Trump-sanctions were lifted under Joe Biden and high-level diplomates' speeches, messages [409] and

405 'The American Service-Members' Protection Act (ASPA, Title 2 of Public Law 107–206)'. Available at: https://www.govinfo.gov/content/pkg/PLAW-107publ206/html/PLAW-107publ206.htm (Accessed: December 2023)

406 Open Society Justice Initiative, 2021; International Criminal Court, 2015h.

407 'U.S. confirms Bosco Ntaganda turned himself in at U.S. Embassy in Kigali'. Available at: https://www.reuters.com/article/us-rwanda-warcrimes-usa-confirmation-idUSBRE92H0T620130318 (Accessed: July 2022)

408 'United States announces $5 million reward for Joseph Kony'. Available at: https://cf.usembassy.gov/united-states-announces-5-million-reward-for-joseph-kony/ (Accessed:_ December 2023)

409 *i.* U.S. Embassy In Israel, 2021.
*ii.* United States Mission to the United Nations, 2021:
'Remarks at the UN General Assembly Annual Debate on the International Criminal Court, Ambassador Richard Mills Deputy U.S. Representative to the United Nations, November 10, 2021':
"(...) As noted in the Court's report on developments between August 2020 and August 2021, this has been a year of significant change and activity at the Court. The United States would like to commend the ICC for a number of achievements in some of the longest-running situations before the Court – situations involving national governments that invited the ICC to act because they were unable to do so. (...)
We are pleased to have assisted in facilitating the voluntary surrender of Ongwen and the transfer of Ntaganda to the ICC. (...) Turning back to the ICC, we would also like to take note of the important effort underway relating to reform as the Court approaches its twentieth birthday. All organs of the Court and States Parties, working with other states, civil society, and victims, have engaged over the past year in consideration of a broad range of reforms, including those identified in the Independent Expert Review of the ICC.
Although, as this Assembly knows, the United States is not a State Party, we welcome these ongoing efforts to identify and implement reforms that will help the Court better achieve its core mission of serving as a court of last resort in punishing and deterring atrocity crimes. While we maintain our longstanding

objection to the Court's efforts to assert jurisdiction over personnel of non-States Parties absent a Security Council referral or the consent of the state, we believe that our concerns are best addressed through engagement with all stakeholders. Where domestic systems are unable or unwilling to genuinely pursue the justice that victims deserve, and that societies require to sustain peace, international courts such as the ICC can have a meaningful role. (...)"

*iii.* 'Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma' 21 March, 2022:

"(...) Efforts are moving forward, not only at the International Court of Justice, but also through the International Criminal Court and through the domestic courts of Argentina, in a case brought under universal jurisdiction.

The day will come when those responsible for these appalling acts will have to answer for them. (...)"

*iv.* S.Res.531 - 117th Congress, 2021-2022:

„(...) the Senate -

(1) strongly condemns the ongoing violence, war crimes, crimes against humanity, and systematic human rights abuses continually being carried out by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;

(2) encourages member states to petition the ICC and the ICJ to authorize any and all pending investigations into war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin's military commanders, at the direction of President Vladimir Putin;

(3) supports any investigation into war crimes, crimes against humanity, and systematic human rights abuses levied by President Vladimir Putin, the Russian Security Council, the Russian Armed Forces and their proxies, and President Putin's military commanders; (...)";

*v.* United Nations, 2022:

'8948th meeting, SC/14766, 17 January 2022. Briefing Security Council on Darfur, Prosecutor Urges Sudan Government Provide International Criminal Court Safe Access to Crime Scenes, Witnesses':

"(...) Richard M. Mills, JR., (United States) said his country has participated in assemblies of State Parties to the Rome Statute as an observer and stands ready to engage with the Court to bring accountability to the most serious crimes. His delegation welcomes the strengthening of the Office of Prosecutor and the Court and the Prosecutor's position on prioritizing the Council's referral of Sudan to the Court. He also welcomed the Prosecutor's visit to Darfur in August and the appointment of a Special Adviser. (...)"

*vi.* United States Mission to the United Nations, 2022:

'Remarks at a UN Security Council Arria-Formula Meeting on Ensuring Accountability for Atrocities Committed by Russia in Ukraine. Ambassador Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice':

"(...) The United States is supporting a range of international investigations into atrocities in Ukraine. This includes those conducted by the International Criminal Court, the United Nations, and the Organization for Security

official visits[410] reflect a hopefully durable cooperation policy. The Declaration of the Summit for Democracy (March 29, 2023) also confirmed the positive, cooperative approach when stating that „(...) We acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law."[411] The G-7 meeting (Vilnius, 2023) concerning Ukraine also contained a similar statement.[412]

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and Cooperation in Europe. The United States welcomes the opening of the investigation by the ICC into atrocity crimes committed in Ukraine, and we intend to engage with all stakeholders to achieve our common objectives in ensuring justice. (...)"

410 Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice on May 25, 2022, and US Attorney General Merrick Garland on June 19, 2023, makes surprise ICC visit. Available at: https://www.reuters.com/world/us-attorney-general-garland-makes-surprise-icc-visit-2023-06-19/ (Accessed: December 2023);
or see: Tambay, 2022.

411 U.S. Department of State, 2023:
„We, the leaders of the Summit for Democracy, (...) We are jointly dedicated to (...) Fourth, support civilian control of the military and hold accountable those responsible for human rights violations and abuses, including those committed by non-state actors. We demand that all parties to armed conflict fully comply with their obligations under international humanitarian law including those regarding the protection of civilians, with particular consideration of populations in marginalized or vulnerable situations. We commit to fight against impunity and promote accountability for violations of international law, particularly genocide, war crimes, the crime of aggression and crimes against humanity, including where such crimes involve sexual and gender-based violence. We acknowledge the important role played by the ICC as a permanent and impartial tribunal complementary to national jurisdictions in advancing accountability for the most serious crimes under international law."

412 United Kingdom, Prime Minister's Office, 2023:
„In addition to the elements articulated above, we remain committed to supporting Ukraine by holding Russia accountable. This includes working to ensure that the costs to Russia of its aggression continue to rise, including through sanctions and export controls, as well as supporting efforts to hold to account those responsible for war crimes and other international crimes committed in and against Ukraine, including those involving attacks on critical civilian infrastructure. There must be no impunity for war crimes and other atrocities. In this context, we reiterate our commitment to holding those responsible to account, consistent with international law, including by

In the Israeli political press and think-tank papers, we can also find allusions to established informal contacts with the ICC.[413]

## 9. POSITIONS EXPRESSED BY NON-STATES PARTIES ATTENDING AS OBSERVERS THE 22ND ASSEMBLY OF STATES PARTIES

On the 22nd Assembly of States Parties (December 4-14, 2023), the representatives of Armenia[414] (who had already

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supporting the efforts of international mechanisms, such as the International Criminal Court (ICC)."

413 *i.* Bob, 2021.
*ii.* Bob, 2022a:
„(...) Roy Schondorf's final message praised the units under his authority for having succeeded in fending off "cynical" uses of international law against Israel. (...) Schondorf has been replaced by Dr. Gilad Noam, who has worked closely under him since 2012 and was one of the lead coordinators with the ICC for the unit."
*iii.* Barak, Ranaan, 2021:
"(...) What can Israel do today, ahead of a possible ICC decision to investigate? First, try to shape – or participate in shaping – the priorities of the ICC in the coming five to ten years. I'm not sure what channels of communication exist between states – especially non-party states like Israel – and a prosecutor regarding the scope of an investigation, but I see an added value in maintaining dialogue.
"As a general rule, I am in favor of multilateral engagement. I know decision-makers in Israel don't necessarily share this view, for reasons that range from sheer fatalism – 'it won't have any impact anyway' – to the fear of conferring too much legitimacy to highly politicized international institutions. In the past, Israel declined to cooperate with commissions of inquiry established by the UN Human Rights Council or with the International Court of Justice when it examined the legality of the security fence. I, however, prefer when Israel lays down its narrative and arguments, directly or indirectly, and makes its case. (...)"
*iv.* Bob, 2022b.
*v.* Baruch, Beeri, 2023:
"(...) Over the years, Israel has had informal contacts with the Office of the Prosecution. (...)"

414 International Criminal Court, Assembly of States Parties to the Rome Statute, 2023c.

submitted the ratification instrument of the Rome Statute but its entry into force still needed some weeks), China[415], Iran[416],

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415 International Criminal Court, Assembly of States Parties to the Rome Statute, 2023d:
"China closely follows the activities of the International Criminal Court, and has participated in successive sessions of the Assembly of States Parties to the Rome Statute as an Observer State. (...) China noted the efforts made by the Court in investigation, trial, reparation to victims and cooperation with relevant countries and international organizations. (...) . In the face of the complex and volatile international situation, the international community expects the Court to adhere to the mandate of the Rome Statute, strictly follow the principles of complementarity and international cooperation, determine its jurisdiction of situations independently, objectively and impartially, carryout investigations and judicial proceedings in accordance with international law, interpret and apply the Rome Statute and general international law in an accurate, bona fide manner and with uniform standards, so as to play a constructive role in appropriately resolving relevant issues. (...) China expects the Court to exercise its powers in accordance with international law and to avoid politicization and double standards. (...) China expects the International Criminal Court to seriously take stock of its achievements and lessons over the past 25 years, to respond positively to the concerns of all countries, to comply strictly with international law, to perform faithfully its duties, with a view to contributing to the maintenance of sustainable peace and the realization of true justice through practical actions, and to win firm trust and support of the international community."

416 International Criminal Court, Assembly of States Parties to the Rome Statute, 2023e:
"At the outset, I would like to commend and appreciate the Presidency, the Judges, the Prosecutor, the Registrar and all the staff members of the International Criminal Court (ICC) who have worked tirelessly to ensure that the ICC continues to fulfill its role to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. (...) For the sake of functionality and efficiency, the Islamic Republic of Iran firmly urges the Court to prioritize and address the outstanding cases before it, rather than increase its docket with cases that could be dealt with more efficiently and effectively at the domestic level. (...) Nevertheless, the Court must demonstrate whether ICC is an independent and impartial International Criminal Court in combating impunity and upholding the rules-based order. (...) The international community has a shared responsibility to maintain justice and to prevent impunity. On that account, the Islamic Republic of Iran supports the efforts of the international community to punish the atrocity crimes, promote and realize judicial justice, and to closely follow the activities of the ICC and, in particular, the situations of Palestine and Afghanistan."

Israel[417] and the United States[418] delivered speeches in their

417 International Criminal Court, Assembly of States Parties to the Rome Statute, 2023f:
"Today marks two months since the horrific attacks perpetrated against Israel by Hamas and other terror organizations in the Gaza Strip. (...) It is precisely such atrocities that led to the creation of the international criminal justice project, to which Israel has contributed and to which it remains committed. (...) the Rome Statute, (...) requires independent and impartial analysis based on an accurate and well-founded understanding of the law and the evidence (...) While Israel is not a party to the Rome Statute and has not changed its position regarding the Court's jurisdiction, Israel takes note of the visit by the ICC Prosecutor last week, including his time in Israel at the invitation of families of Israeli victims and survivors of the October 7th attacks. (...)"

418 International Criminal Court, Assembly of States Parties to the Rome Statute, 2023g:
Beth Van Schaack, Ambassador-at-Large for Global Criminal Justice said: "(...) I am honored to address you on behalf of the United States Observer Delegation. (...) I also want to commend the Court for its achievements over the past year. The Court continues to demonstrate that it is an essential component of the ecosystem of international justice. (...) We know that responding meaningfully to demands for justice is not only an important objective in its own right, but is a core element for a sustainable peace—a recognition embodied in the Rome Statute itself. Last year, I described our progress implementing President Biden's "reset" of the U.S. relationship with the ICC. Since then, we have worked to put this relationship on a sustainable path. For example, we are providing practical assistance to the OTP across a range of its investigations. We are helping the Court track fugitives across several situations, including through offering rewards for their arrest. With others, we are providing input and commentary on the OTP's policy papers. We are convening meetings with experts from the U.S. government, the private sector, the Court, and other accountability mechanisms to identify practical solutions to some of the most difficult challenges facing international justice. actors, including with respect to witness protection, insider witnesses, and cybersecurity. Finally, we have been pleased to help facilitate engagements between Washington and The Hague. This includes visits to the Court by bipartisan members of Congress and their staff and Attorney-General Merrick Garland—the first by a member of the U.S. cabinet. These interactions have helped to foster a greater understanding of the ICC in the United States and are building connections across the various branches of government with the Court. In addition, and in line with the principle of complementarity, the United States is pursuing a broad range of initiatives to strengthen the objectives of the Rome Statute system and support accountability for atrocity crimes globally. (...) Another essential component of these efforts is being self-critical. We cannot advance justice abroad if we do not confront injustice at home. We know that, and we take very seriously allegations of misconduct by U.S. personnel, but also

'observers' capacity. It is worth analysing their perception of the role of the International Criminal Court. After reading them, it is clear that although neither perspectives of formal adherence, nor recognition of jurisdiction over themselves had been promised, they all underlined the important role that the International Criminal Court plays in a global justice system.

## CONCLUSIONS

It is not easy to prepare a short conclusion in this complex, multidimensional topic especially when it is obvious that the realisation of the universally backed purpose, i.e. *'to put an end to impunity'* is not void of foreign affairs turbulences and geopolitical issues in spite of the existence of sufficiently clear legal structures.

My statement above cannot be easily reconciled with the *quasi* Kantian categorical imperative imposing the comprehensive prosecution of war crimes and crimes against humanity. Realistically thinking, we must take into account several fundamental principles, rules and viewpoints of international law at the same time.

In my view, these are the following:

*i.* the *pacta sunt servanda* and the Rome Statute;
*ii.* the *pacta sunt servanda* and those - often collateral - treaties which were contracted in order to implement the rules of the Rome Statute;
*iii.* the *pacta tertiis nec nocent, nec prosunt* and the Rome Statute;
*iv.* the objective legal personality of the International Criminal Court as it was stated in one of its Rohingya decisions,

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legacies of harm to communities of color and others in our own country. As Vice President Harris has noted "we know our work at home will make us stronger for the world." Esteemed colleagues, in conclusion, the United States pledges to enhance our efforts on all these fronts, including through robust engagement and cooperation with the ICC and with friends of the Court—parties and non-party states alike. We know that our efforts are all the more powerful by standing with all of you, the community of states committed to global justice.(...)"

similarly to the demonstration made by the International Court of Justice in *re Bernadotte*[419];

*v.* the legal value of unilateral declarations of States in international law;

*vi.* the binding character of the Security Council's resolutions if adopted by the UNSC "Acting under Chapter VII";

*vii.* the obvious presence of so many clear customary law rules or precise dispositions stipulated by universally or *quasi* universally adopted conventions in different chapters of the Rome Statute;

*viii.* the principle of the cooperation of States

*ix.* the past and present of the relationship between the given State and the International Criminal Court

*x.* the will and the short- and long-term interests of sovereign States.

It is certainly not easy to harmonize all these factors, but it is not impossible either ...

In fact, the real question is not whether the International Criminal Court enjoys jurisdiction over non-States Parties' nationals for crimes committed on the territory of a State Party, but whether ICC decisions, warrants and judgments can have legal impact on non-State Parties, and if they can, what are they based on, how and in what conditions do they apply?

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419 International Criminal Court, 2018b, §§ 48-49, p. 29:
"48. In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the "International Criminal Court", possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.
49. Having said that, the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 14 and 15 of the Statute. (...)"

# CHAPTER V

# Children in the practice of the International Criminal Court[420]

## 1. CHILDREN IN THE TEXT OF THE ROME STATUTE

Children are mentioned at a good dozen points of the Statute. They appear in the Preamble[421] and in the subsequent articles either in the context of certain crimes (genocide[422], enslavement[423], child-soldering[424]) or in connection with the required age for criminal

420 This chapter was published originally in: Benyusz, M., Raisz, A. (eds) (2024) *International Children's Rights*. Budapest – Miskolc: CEA Publishing, pp. 315-343. https://doi.org/10.71009/2024.mbar.icr_13
I thank Anikó Raisz and Márta Benyusz for their consent to the republishing.

421 Rome Statute, Preamble: "(..) Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, (...)"

422 Rome Statute, Article 6, Genocide: "For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (...) (e) "Forcibly transferring children of the group to another group". (Same text as in the 1948 Genocide Convention)

423 Rome Statute, Article 7, Crimes against humanity:
"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (c) Enslavement;
(2) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

424 Rome Statute in Article 8 (2)(b) concerning war crimes committed in an international armed conflicts and in Article 8 (2)(e) about war crimes committed in a non-international armed conflict. Article 8 (2)(b) (....) (xxvi) Conscripting

responsibility[425] or with the qualifications candidates are required to produce in order to be elected to the judiciary[426]. There are references on children in some other articles emphasizing the need of deep children-related expertise in the Office of the Prosecutor[427]. The articles containing the Prosecutor's duties and powers mention the word 'children' in the context of witness protection during the investigation[428]. The importance of paying attention to children's special needs when they are involved as witnesses or victims in an actual procedure is repeated later again in a more detailed article.[429]

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or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. Article 8 (2)(e) (....) (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

425 Rome Statute Article 26, Exclusion of jurisdiction over persons under eighteen: "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime".

426 Rome Statute, Article 36, Qualifications, nomination and election of judges: "(8) (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children".

427 Rome Statute, Article 42, The Office of the Prosecutor: "(9) The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children".

428 Rome Statute, Article 54, Duties and powers of the Prosecutor with respect to investigations:
"1. The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute".

429 Rome Statute, Article 68, Protection of the victims and witnesses and their participation in the proceedings:
"1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the

The word 'children' also emerges in respect to those who are entitled to submit a motion for the revision of a sentence if the condemned person passed away.[430]

On the following pages, I will try to give an overview of the implementation of these abstract statutory norms first through the soft-law type policy documents issued by the Prosecutor when summarizing the directions and principles of his proceedings and second, by giving a short introduction into the cases where children were directly concerned.

## 2. CHILDREN IN THE KEY STRATEGIC AND POLICY DOCUMENTS OF THE OFFICE OF THE PROSECUTOR

The Prosecutor issues policy papers in order to show the approach he follows in the different aspects of case-selection, prioritisation, investigation and representation of the charges to the legal community, the media and the great public. The twenty-, thirty- or even forty-page long publications summarize the established practice in a condensed way without obliging the interested public officer, academic

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crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. the rights of persons arising under this Statute.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness".

430 Rome Statute, Article 84, Revision of conviction or sentence:
"1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (....)"

researcher or journalist to go through the hundreds of submitted motions in a given case.

The Prosecutor issued a comprehensive document about the Policy on Children[431] in 2016 where *'child sensitive approach'* and *'the best interest of the child'* are the returning notions borrowed from the *Convention on the Rights of the Child* in the nine chapters dealing *inter alia* with the regulatory framework, preliminary examinations, investigations, prosecutions, cooperation, institutional development and implementation. All these chapters are well footnoted reflecting the document's coherence with the convention and its monitoring as well as children related approaches of different UN bodies.

As it is emphasized[432], Article 21 of the Rome Statute[433] is the basis to keep the ICC's practice and that of the *Convention on the Rights of the Child* in harmony.

The booklet points out the importance of the twofold age limit: while according to the Rome Statute a child under the age of fifteen years old or younger to be considered as a child-soldier, however, concerning other crimes and different other rules of protection, the age limit is 18 years or below. This second age limit is also applicable when the word 'child' is not mentioned in the legal definition of a given crime, however the actual victims are children, like in case of 'forcible

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431 Policy on Children, 15 November 2016. Availabe at: https://www.icc-cpi.int/161115-otp-policy-children (In the followings: Policy on Children, 2016).

432 Policy on Children, 2016, § 37, p. 18.

433 Rome Statute, Article 21, Applicable law :
"1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (...)
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. (...)"

transfer of population' or 'attacks against buildings dedicated to (...) education or (...) hospitals'.[434]

Moreover, the OTP's approach relies on the use of a presumption based *de facto* on the physical outlook: "the Office will consider young persons whose ages are unknown to be "children" for the sole purpose of its engagement with them, unless there is a reasonable basis to believe otherwise."[435] (As a footnote explains, this approach follows the jurisprudence of the Special Court for Sierra Leone.)

The booklet emphasizes that the OTP requires "a child-sensitive approach in all aspects of its work involving children. This approach appreciates the child as an individual person and recognises that, in a given context, a child may be vulnerable, capable, or both. The child-sensitive approach requires staff to take into account these vulnerabilities and capabilities. This approach is based on respect for children's rights and is guided by the general principles of the 1989 Convention on the Rights of the Child: non-discrimination; the best interests of the child; the right to life, survival and development; and the right to express one's views and have them considered."[436]

The 'best interest of the child' formula means in the context of prosecutions that "[c]onsistent with its commitment to apply a child-sensitive approach, the Office will, within the context of its mandate, take into account the best interests of a child as a primary consideration. This involves an ongoing assessment of what would best protect a child's physical, psychological and emotional safety, security and well-being, and applies to decisions that affect children, as individuals or in general."[437]

This rule is implemented using a two-step process[438], where the first is the assessment of the given child's specific situation[439], while

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434 Policy on Children, 2016, §§ 2, 16, pp. 6, 11-12.
435 Policy on Children, 2016, § 16, p. 12.
436 Policy on Children, 2016, § 22, p. 13.
437 Policy on Children, 2016, § 28, p. 15.
438 Policy on Children, 2016, § 29, p. 16.
439 Policy on Children, 2016, § 30, p. 16:
"In making an assessment about the child's specific situation, in the first step of the best interests inquiry, the Office will consider:

the second consists of the examination of an eventual need for balancing different interests.[440]

When explaining the legal content of different crimes related to children, the Prosecutor puts that a child's victimization could amount to the level of a crime of torture under the Rome Statute even if an adult's victimization does not forcibly amount to the required threshold of torture in a similar case.[441] Children's victimization can rightfully be taken into consideration when assessing the 'gravity'[442] and the

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(i) the individual profile of the child concerned, taking into account relevant factors, such as age, level of maturity, experience, education, ability or disability, health conditions, membership in a minority group,
sex, and gender, as well as whether the child has been displaced, separated, trafficked, detained, abducted or sexually exploited, or is a parent or head of household; and
(ii) the child's social and cultural context, for example, the presence or absence of parents or caregivers, residence in a familial or non-familial setting, the quality of the relationships between the child and his or her family or caregivers, and the environment in relation to safety."

440 Policy on Children, 2016, § 32, p. 17:
"Once a best interests assessment is made as a first step, the Office will then consider whether there are other factors, including legal or operational issues, which may require a balancing of various interests. The Office will resolve potential conflicts on a case-by-case basis, carefully balancing the interests of all parties, in an effort to find a suitable compromise. If harmonisation is not possible, the Office will analyse and weigh the rights and interests of all those concerned. Substantial weight will be placed on the child's best interests. In circumstances where the ultimate conclusion is that other considerations outweigh the initial best interests assessment, the Office will strive to implement appropriate measures to mitigate any negative impact that such a decision may have on the child."

441 Policy on Children, 2016, § 50, pp. 23-24:
"The Statute also proscribes other related crimes, for example, other inhumane acts as a crime against humanity (article 7(1)(k)), 62 and inhuman treatment (article 8(2)(a)(ii)), cruel treatment (article 8(2)(c)(i)) and wilfully causing great suffering (article 8(2)(a)(iii)) 65 as war crimes. The Office recognises that, owing to their physical and emotional development and their specific needs, treatment, potentially amounting to torture and related crimes, may cause greater pain and suffering to children than to adults. It will bear this in mind when considering whether such treatment against children may amount to a crime under the Statute".

442 Policy on Children, 2016, § 57, p. 26.

'interest of justice'[443]. Sexual and gender-based crimes if committed against children should be perceived as militating for prosecution[444]. Crimes committed against children deserve higher penalties[445] and should be taken into account when judges are deciding on the modalities of the reparation.[446]

According to the *'Do no harm'* principle and in order to avoid re-traumatisation, children's character and their special needs are to be observed during contacts and interviews. A special psycho-social assessment should be done prior to the interview, which should be video-recorded. [447] Even if some children are ready and keen to step up as a witness during the trial, the personnel of the OTP should carefully analyse whether this would really be in the child's interest.[448] If the decision is to call him/her to testify, a special psychological coaching is required before, during and after the testimony.[449]

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443 Policy on Children, 2016, § 59, p. 27:
"In determining the gravity of potential cases, the Office assesses the scale, nature and manner of the commission of the crimes as well as their impact on victims and communities. In general, the Office will regard crimes against or affecting children as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law".

444 Policy on Children, 2016, §§ 85-86, p. 34.

445 Policy on Children, 2016, §§ 101-102, pp. 38-39.

446 Policy on Children, 2016, §§ 105-107, pp. 39-40.

447 Policy on Children, 2016, §§ 71-82, pp. 30-33.

448 Policy on Children, 2016, § 89, p. 35:
"In the process of selecting witnesses to testify, the Office will bear in mind the attributes a child may possess, including his or her vulnerabilities, capabilities and resilience, as well as the relevance of the evidence the child can provide. It will take into account considerations relating to any psychosocial and security assessments, as well as any possible healing effect which may be associated with providing evidence. The Office recognises that certain child witnesses may want to testify in support of judicial proceedings, and may regard testimony as a component of their own recovery process. The Office will give careful consideration to whether taking evidence will be of benefit or harm to a child. Engagement with children will be conducted by staff members with expertise relating to vulnerable witnesses, including children".

449 Policy on Children, 2016, §§ 91-97, pp. 35-37.

To deal with all the complex policy concerning children and ICC, a Special Advisor on Children in and affected by Armed Conflict was appointed by the Prosecutor.[450]

This Policy Paper has underwent a certain actualization and was also subject of a public consultation.[451] The 2023 edition confirmed the established strategy and the considerations and applied technics were settled in a matrix composed of slightly reformulated objectives and principles.

The new version[452] formulates six objectives and seven principles.

The six objectives are as follows: *a.* To help remedy the historic under-representation and lack of engagement with children in international criminal justice processes; *b.* To emphasise its view that all crimes under the Rome Statute may be committed against children or otherwise affect them in myriad ways; *c.* To ensure that in all dealings related to children, the Office takes a child rights, child-sensitive, and child-competent approach guided by the best interests of the child; *d.* To actively reflect and adapt to issues related to intersectionality, children's different developmental stages and their evolving capacities and capabilities; *e.* To emphasise the Prosecutor's commitment to establish an institutional environment that facilitates effective investigation and prosecution of crimes against and affecting children—including through recruitment, training, external collaboration, and meaningful implementation, monitoring, and evaluation measures; *f.* To promote the exchange of lessons learned and best practices arising from local and international accountability efforts.[453]

The following seven principles are enumerated and explained in the document: *a.* Taking a child rights, child-sensitive, and child-competent approach; *b.* Acknowledging diversity among children; *c.* Taking an intersectional approach; *d.* Taking a survivor-centred, trauma-informed approach; *e.* Proactive consideration of and engagement

450 Policy on Children, 2016, § 120, p. 43.
451 International Criminal Court, 2023m.
452 International Criminal Court, Office of the Prosecutor, 2023a. (In the followings: Policy on Children, 2023)
453 Policy on Children, 2023, p. 7.

with children; *f.* Consent and assent; *g.* Cooperation and complementarity.[454]

Children's special interests are emphasized in other policy papers dealing with general or other special aspects of the OTP. They were mostly issued a few years prior to the publication of the Policy on Children.

When the *Policy Paper on Sexual and Gender-Based Crimes*[455] refers to children, it evokes the *'Do no harm'* principle[456] with special attention paid to gender aspects of child-soldering and to child victims of enslavement.[457] In case of child-victims, special protective measures are advisable including restrictions of the public hearings.[458]

The *Policy Paper on Preliminary Examination*[459] stipulates that when the OTP is analysing the nature of the crime as a component of the assessment of the *gravity of the crime*, it should pay a particular attention to the fact whether the crimes have been committed against children.[460]

The *Policy paper on case selection and prioritisation*[461] states that the victimization of children is considered as an important factor when assessing the gravity of the crimes[462] and promises that "[t]he

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454 Policy on Children, 2023, pp. 23, 26, 27, 28, 29, 30 and 31.

455 International Criminal Court, Office of the Prosecutor, 2014a. (In the followings: Policy Paper on Sexual and Gender-Based Crimes)

456 Policy Paper on Sexual and Gender-Based Crimes, § 5, p. 6.

457 Policy Paper on Sexual and Gender-Based Crimes, §§ 8, 34, pp. 6 and 21.

458 Policy Paper on Sexual and Gender-Based Crimes, § 88, p. 34.

459 International Criminal Court, Office of the Prosecutor, 2013. (In the followings: Policy Paper on Preliminary Examinations).

460 Policy Paper on Preliminary Examinations, §§ 61, 63 p. 17:
"The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact. (...)
The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction".

461 International Criminal Court, Office of the Prosecutor, 2016a. (In the followings: Policy paper on case selection and prioritisation).

462 Policy paper on case selection and prioritisation, §§ 39, 46, pp. 13, 16.

Office will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes."[463] A relatively similar reference can be found in the *Policy Paper on Situation Completion*[464] and in the *Policy Paper on the Crime of Gender Persecution*[465], in which the Prosecutor presents its policy concerning the crime falling under Article 7(1)(h)[466] of the Statute.

The *Policy Paper on Victims' Participation*[467] issued during the first phase of the Lubanga trial raised two aspects of the crime of child-soldering: *i.* the identification of the natural persons who can act as indi-

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463 Policy paper on case selection and prioritisation, § 46, p. 16.

464 International Criminal Court, Office of the Prosecutor, 2021a, § 38, p. 15:
"The Prosecutor's decision whether to prosecute a case, or otherwise how to manage it, will be informed by a rigorous process of internal peer review of the evidence, including the participation of senior members of the Office assigned to other situations as well as relevant subject-matter specialists (law, analysis, sexual and gender based crimes, children, etc.)."

465 International Criminal Court, Office of the Prosecutor, 2022. (In the followings: Policy on the Crime of Gender Persecution):
"With regard to gender persecution committed against or affecting children, the Office considers such acts or crimes as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law. Persecutory acts targeting children on the basis of age or birth may be charged on intersecting grounds, including gender, in accordance with the Policy on Children. The Office will pay particular attention to child victims of all ages—from birth to adolescence—of gender persecution when assessing the gravity and impact of such crimes. Additionally, when engaging with children who are victims of gender persecution, the Office will apply a trauma-informed, child-sensitive and child-competent approach".

466 Rome Statute, Article 7, Crimes against humanity:
"1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".

467 International Criminal Court, Office of the Prosecutor, 2010. (In the followings: Policy Paper on Victims' Participation)

rect victims of this crime and their right of participation[468] and *ii.* the right of participation of legal persons, in fact schools[469].

The *Documenting international crimes and human rights violations for accountability purposes - Guidelines for civil society organisations*[470] is a recent document jointly issued by the Prosecutor, Eurojust and the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes. When emphasizing the importance of cooperation with the NGO-s, it points out that these organizations should also observe the rules and principles protecting children because of their particular vulnerability[471] and secure professional psychological pre-assessment and coaching previous to interviews.[472]

According to the Prosecutor's regular reports on preliminary examination, it can be seen that children related crimes seemingly falling un-

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468 Policy Paper on Victims' Participation, pp. 10-11:
"The Chamber ruled that the category of "indirect victims" entitled to participate in the proceedings, in addition those with a close personal relationship to a direct victim, may include the harm suffered by persons who intervened to prevent a crime alleged against the accused. By contrast, it excluded from the category of "indirect victims" those who suffered harm as a result of soldiers) since "it is only victims 'of the crimes charged' who may participate in the trial proceedings pursuant to Article 68(3)". The Office concurs that "victims" under rule 85(a) can be persons who were not the direct targets of a crime, but who suffered indirect harm as a result of the commission of a crime. The Office supports a broad characterization of "indirect victims". In Lubanga, the Office expressed its views that those who have suffered harm as a result of crimes committed by child soldiers, i.e. as a consequence of the crimes charged, are also entitled to participate".

469 Policy Paper on Victims' Participation, p. 8:
"In relation to rule 85(b), the Office supports participation by legal persons meeting the criteria and having sufficient authority to represent the organization or institution concerned. Trial Chamber I in the Lubanga case ruled, for example, that the principal of a school from which children were recruited by Lubanga's militia, and who himself qualified as a victim under rule 85(a), also had sufficient authority to act on behalf of the school under rule 85(b). Accordingly, it held that he could participate both on his own behalf and on behalf of his school".

470 European Union Agency for Criminal Justice Cooperation, 2022b. (In the followings: Documenting international crimes)

471 Documenting international crimes, pp. 13,14, 16, 23, 24, 25, 26, 27, etc.

472 Documenting international crimes, pp. 13, 14, 15, 24, 25, 26, 27, etc.

der the Rome Statute were well on the agenda, and e.g., in 2020[473], preliminary examinations covered these types of crimes in the following situation countries: Uganda[474], Australia[475], Venezuela[476], Colombia[477], Philippines[478] Israel and the Palestinian Authority[479] and Nigeria[480].

As to the OTP's investigation activity, children related war crimes or crimes against humanity – in most cases in conjunction with other crimes - are currently under investigation e.g., in Libya[481], Ukraine and Russia[482], Sudan[483] and Afghanistan[484].

In the recently published Strategic Plan for 2023-2025 of the OTP[485], the promise to "ensure effective investigations and prosecutions of Sexual and Gender-Based Crimes and Crimes Against Children" figures at the sixth place among the strategic goals[486] with special emphasize on the fact that "these crimes are considered, when reflecting the facts and evidence of the case, from the initial investigative and prosecutorial stages when developing case theories, investigation plans and charging strategies"[487] and that its staff should be continuously trained "on the relevant legal framework and on cultural, child and gender-related issues related to the situation and the specific communities in which the investigation is being conducted"[488]. The document also underlined the need of "a child-sensitive and

473 International Criminal Court, The Office of the Prosecutor, 2020b. (In the followings: Report on Preliminary Examination Activities 2020)
474 Report on Preliminary Examination Activities 2020, § 40, p. 13.
475 Report on Preliminary Examination Activities 2020, § 46, p. 14.
476 Report on Preliminary Examination Activities 2020, § 97, p. 25.
477 Report on Preliminary Examination Activities 2020, § 109, pp. 109-110.
478 Report on Preliminary Examination Activities 2020, § 188, p. 47.
479 Report on Preliminary Examination Activities 2020, § 224, p. 57.
480 Report on Preliminary Examination Activities 2020, § 255, 257, pp. 65-66.
481 International Criminal Court, 2023n.
482 International Criminal Court, 2023c.
483 International Criminal Court, 2022aa.
484 International Criminal Court, 2021l.
485 International Criminal Court, Office of the Prosecutor, 2023b. (In the followings: OTP Strategic Plan 2023-2025).
486 OTP Strategic Plan 2023-2025), p. 17.
487 OTP Strategic Plan 2023-2025, § 59, p. 17
488 OTP Strategic Plan 2023-2025, § 61, p. 18

child-competent approach to investigations and prosecutions, adapted to children's developmental stages and to diverse types of crimes, taking into account the best interests of the child".[489] Accordingly, a prior control of the conformity to these principles should be introduced in all documents and publications of the OTP.[490]

The commitment of the OTP is also reflected in the Strategic Plan of the ICC: "The OTP will pay special attention to victims of SGBC and crimes against or affecting children (CAC). An increased systematic focus in all situations and cases on these crimes, combined with an expansion of the OTP's competence to deal with victims of such crimes and with strict application of related policies and standards, will be at the heart of the OTP's strategy with regard to SGBC and CAC."[491]

## 3. CHILDREN IN THE JURISPRUDENCE OF THE ICC CHAMBERS

### 3.1. Children as direct or indirect victims

Children can be direct victims of special children-related crimes (e.g., child-soldering) and of several 'ordinary' crimes like e.g., wilful killing, persecution, torture, deportation, transfer of population, sexual and gender-based crimes, slavery, etc.

They are indirect victims if the crime is committed against an adult, but the harm caused concerns them as well, like e.g., their parents are killed, or their educational premises are destroyed.

#### 1.3.1. Child-soldering

In the jurisprudence of the International Criminal Court, child-soldering has been treated so far in the Lubanga[492], Ntaganda[493] and Ongwen[494] cases and it forms part of the – still pending - Yekatom and

489 OTP Strategic Plan 2023-2025, § 61, p. 18
490 OTP Strategic Plan 2023-2025, § 63, p. 18.
491 International Criminal Court, 2023o, § 42, p. 14.
492 Lubanga Case
493 Ntaganda Case
494 Ongwen Case

Ngaïssona case[495]. Hereby, I limit myself to the presentation of some common features of this type of crime and the problems encountered.

The international armed conflict version and the non-international armed conflict version of this crime are nearly the same, the only difference being the presence of the adjective 'national' in the first.[496]

The first challenge was how to interpret the expression *'to participate actively in hostilities'*. In the case *The Prosecutor v. Thomas Lubanga Dyilo,* related with the civil war in the Ituri Province of the Republic Democratic of Congo, the Trial Chamber first explained why any reference to the jurisprudence of the Special Court for Sierra Leone is legitimate[497], then followed the specific approach of the SCSL in its judgement, i.e. "any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations"[498]. However, "[a]n armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or

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495 Yekatom and Ngaïssona Case

496 Rome Statute Article 8(2)(b), (XXVI) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; Art 8 (2)(e) (VII) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

497 International Criminal Court, 2012a, (In the followings: The Prosecutor v. Lubanga judgment), § 603, p. 275:
"The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute".

498 Special Court for Sierra Leone, 2008. (In the followings: CDF Appeal Judgement), § 144.;
The Prosecutor v. Lubanga judgment, § 573. and footnote 1719, p. 263.

acting as human shields are some examples of active participation as much as actual fighting and combat."[499]

Trial Chamber I summarized the SCSL's position as follows: "The SCSL therefore held that the concept of "using" children to participate actively in hostilities encompasses the use of children in functions other than as front-line troops (participation in combat), including support roles within military operations."[500] It quoted that "'[u]sing' children to 'participate actively in the hostilities' encompasses putting their lives directly at risk in combat."[501]

On the basis of these considerations, the Trial Chamber came to the following conclusions:

"The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity

499 Special Court for Sierra Leone, 2007. (In the followings: SCSL, AFRC Trial Judgement), § 737. The Prosecutor v. Lubanga judgment, § 624, footnote 1798, p. 284–288.

500 The Prosecutor v. Lubanga judgment, § 625, p. 285.

501 SCSL, AFRC Trial Judgement, § 736. The Prosecutor v. Lubanga judgment, § 626, footnote 1800, p. 285.

constitutes "active participation" can only be made on a case-by-case basis."[502]

In *The Prosecutor v. Bosco Ntaganda case* concerning the same civil war and the same paramilitary formation (i.e., Ntaganda was Lubanga's deputy in command, a *quasi*-chief of staff within the UPC/FPLC), the Trial Chamber noted "that active participation in hostilities is temporary in nature under IHL and that individuals cease to actively participate when not engaged in combat related activities. Any charge of active participation must therefore be framed in a more specific way."[503]

In *The Prosecutor v. Dominic Ongwen* case, linked with the religiously and partially ethnically motivated non-international armed conflict in 'Acholiland' in the Northern part of Uganda, the Trial Chamber defined the duties performed by child soldiers of the Lord's Resistance Army as follows: "Children under 15 years of age serving as soldiers in Sinia brigade took part in fighting. They further facilitated LRA attacks by raising alarms, burning and pillaging civilian houses, collecting and carrying goods from attack sites and serving as scouts. During all four attacks relevant to the charges, children under the age of 15 participated in the hostilities."[504]

Taking into account that the case *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* has not yet finished when these pages are written, I can only refer to the decision on the confirmation of charges, issued by the Pre-Trial Chamber.[505] Mr Yekatom, as one of the commandants of the christian Anti Balaka militia and Mr Ngaïssona, as an alleged top political leader of the organization are charged for crimes committed against the Muslim population in the Central African Republic and the crime of child soldering – as to Mr Yekatom - was also confirmed by the Pre-Trial Chamber.

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502 The Prosecutor v. Lubanga judgment, § 628, pp. 285-286.

503 International Criminal Court, 2019j. (In the followings: The Prosecutor v. Bosco Ntaganda, Judgment), § 1113, p. 493.

504 International Criminal Court, 2021ab. (In the followings: The Prosecutor v. Dominic Ongwen, Trial Judgment), § 225, p. 70.

505 International Criminal Court, 2021v.

The Pre-Trial Chamber concluded that there are substantial grounds to believe that child-soldering was performed in the following manner: "Children were also present in several other locations under Yekatom's control or where Yekatom was present as well, including checkpoints and barricades established by his elements. (...) Once enlisted, children were used to carry out a variety of tasks. They were given the role of messengers or spies, sent to operate checkpoints set up by Anti- Balaka groups, or simply used as a free workforce, (..) Children were also forced to participate in military-style training aiming at teaching them how to behave in combat. (...) children were then used to injure and weaken captured enemies, prior to Anti-Balaka elements killing them. (....) Finally, children were mobilised to directly participate in hostilities (....)."[506]

A recurring problem of the prosecution for the crime of child-soldering is however of evidentiary nature. How to certify the relevant age and namely i. how to assess the pertinence of the evidence which refer to child-soldering in UN terms i.e., *under the age of eighteen years*, and *ii.* how to prove that the person in question was *under the age of fifteen years.*

The fact that the different UN peacekeeping missions in the African countries identified child-soldiers as being eighteen years old of younger is based on the Convention on the Rights of the Child (20 November 1989)[507] and the Optional Protocol to the Convention on the

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506 International Criminal Court, 2021r: § 148-149, pp. 67-68.

507 Convention on the Rights of the Child, 20 November 1989, Article 38:
"1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict".

Rights of the Child on the involvement of children in armed conflict (25 May 2000)[508] both aiming to grant a greater protection by fixing

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508 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000:
Article 1: "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".
Article 2: "States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces".
Article 3:
"1. States Parties shall raise in years the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that: (a) Such recruitment is genuinely voluntary; (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians; (c) Such persons are fully informed of the duties involved in such military service; (d) Such persons provide reliable proof of age prior to acceptance into national military service.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child".
Article 4:
"1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. 3. The application of the present article shall not affect the legal status of any party to an armed conflict".

a higher age (18 years) than the first[509] and the second[510] Additional protocols of 1977 to the 1949 Geneva Conventions which stipulate 15 years, as the Rome Statute does it as well. (It is worth adding that with the exception of the Rome Statute, other conventions make distinction between the minimum age for enlisting and for participation in hostilities. The comment made by the International Committee of

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509 Additional Protocol I (1977), Article 77 - Protection of children:
"1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed".

510 Additional protocol II:
"3. Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured (...)".

the Red Cross also recognizes that problems of coherence exist in the interplay of these instruments[511].)

The outcome is that the use of UN reports, when referring to child soldiers seen in training centres, camps and posts, is subject to caution within the ICC and additional communication or materials are required before passing a decision on how many child soldiers have been detected. The same can be said about documents delivered during the *Disarmament and Demobilization and Reintegration Programs* (DDR) organized generally with the help and under the supervision of the Unicef and the International Bank for Reconstruction and Development.

These difficulties are exacerbated by the fact that *i.* the beneficiaries of the DDR programs could not always preserve their DDR-certificates, *ii.* for reasons of securing the child from ethnic retaliation, DDR certificates in Congo did not contain any reference to the militia where the given person had been serving as a child-soldier, *iii.* several child-soldiers escaped from the militia and did not undergo a formal DDR centre program ('self-demobilization') – consequently, they did not have any official attestation of their past; *iv.* the identity documents were/are easily falsifiable in some African countries or *v.* even if the documents are valid, the contained data often contradict the other valid documents, because given the lack of a centralized personal identity register, they are based only on the remembrances of a family member. *vi.* An additional challenge is that it happened apparently several times that DDR certificates were issued without the thorough control of the given person or even as a kind of complaisance when the child belonged to the administrator's family or community or if the local official thought that the young person deserved a certain financial compensation for his/her sufferings and tragedy.

As the Trial Chamber pointed out in The Prosecutor v. Bosco Ntaganda case about birth dates provided in official documents, "[w]

511 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000. Available at: https://ihl-databases.icrc.org/en/ihl-treaties/crc-opac-2000?activeTab=default (Accessed: December 2023)

ith regard to the various types of documentary evidence submitted concerning the age of alleged child soldiers, it is noted that, generally, the reported conditions of production of most of these documents were such that the Chamber only attached a very low probative value to them. Where it appeared that documents were produced on the basis of the witness's account alone, or that of their parents, and that no further verification as to the accuracy of the provided information was effectuated, the Chamber found that these documents had limited or no corroboratory value. This was the case, for example, for most of the birth certificates issued by the Etat civil. The Chamber however considered that the documents, to the extent that discrepancies could not be explained in a satisfactory manner, could be of relevance to impeach a witness's credibility."[512]

Similarly, "[w]hen considering school records, and having had particular regard to the informed evidence provided by P-0551, the Chamber found that these records, to the extent that they are contemporaneous documents containing personal information about witnesses, can be given some weight in assessing the witnesses' evidence. Relevant discrepancies, most notably regarding the purported age of alleged child soldiers, but also their attendance of or absence from school during periods for which they report having undergone training, have been discussed on a case-by-case basis."[513]

All these factors have contributed to such a jurisprudential practice that the precise number of child-soldiers is not mentioned in the judgments of condemnation; instead, formulas like "a considerable number of child soldiers", "a significant number of children under the age of fifteen" [514] who were trained or used as body guards, "a large number of child soldiers"[515] or "a large number of children[516]" have been applied and the calculation of the precise number of victims of child-soldering (and of other crimes) was assigned to the Trial Chamber acting during the reparation phase.

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512 The Prosecutor v. Bosco Ntaganda, Judgment, § 86, pp. 40-41.
513 The Prosecutor v. Bosco Ntaganda, Judgment, § 87, p. 41.
514 The Prosecutor v. Lubanga judgment § 811, 838, 857 pp. 361, 369, 376.
515 The Prosecutor v. Bosco Ntaganda, Judgment, § 432, note 1223, p. 192.
516 The Prosecutor v. Dominic Ongwen, Judgment § 223-224, p. 70.

Calculating the 'precise number' is not easy and it needs a close cooperation with the Trust Fund for Victims, autonomous organ of the ICC dealing with assistance and reparation activities using the money collected from states' voluntary contributions, individual and collective donations, etc. in case of the condemned offender's insolvency, which is practically always the case.

The implementation of the reparation case concerning only child-soldiers, i.e., that of Mr Lubanga, is approaching to its end. It will cover cca. 2500 people.[517] The reparation order concerning Mr Bosco Ntaganda's victims was quashed in appeal and the Appeals Chamber instructed the Trial Chamber to review its order and to substantiate it with precise calculation.[518] The new order[519] was issued on July 14, 2023.

Taking into account the overlapping between the Lubanga case and the Ntaganda case, the responsibility for child-soldiering itself was a *res iudicata*. However, Ntaganda's financial liability has to be determined for the harms caused by crimes committed against child-soldiers (SGB crimes or cruel corporal punishments ). In a sub-point below, the reparation of Ntaganda's victims for the transgenerational harms will succinctly be presented.

As Thomas Lubanga's financial liability for child-soldering was established as an *in solidum* liability, the obligation of the re-calculation of Mr Ntaganda's financial responsibility concerned only the other crimes for which he was condemned. For this reason, the sums fixed in the Lubanga reparation order, its calculations and its implementation made by the Trust Fund for Victims were ab ovo considered as an integral part of Mr Ntaganda's liability.

The order on the reparation due to Mr Ongwen's victims was issued on February 28, 2024. As far as Dominic Ongwen was condemned not only for the crime of child-soldering but for other crimes as well, his liability should also cover the reparation of these other

517 More on this: Kovács, 2023, pp. 292-297.

518 See also: Kovács, 2023, pp. 309-319.

519 International Criminal Court, 2023p. (In the followings: Addendum, Ntaganda victims' reparation, 2023)

crimes. (See *Chapter VI: Victims right to reparation at the International Criminal Court.*)

In 2023, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona case is still ongoing, which is why I cannot cite any authoritative judicial statement concerning child-soldiers in the Central African Republic.

### 1.3.2. Abducted children becoming child soldiers or first 'ting-tings' than 'forced 'wives'

The background of the case The Prosecutor v. Domonic Ongwen was the armed conflict between governmental forces and a strange, partially ethnically, partially religiously coloured uprising movement, the Lord's Resistance Army, led by a charismatic person, Mr Joseph Kony[520], acting as a supreme commander and a self-nominated prophet of a religion, mixed from Christianity, local spiritualism and animistic beliefs of the Acholi population.

After some clashes and battles, Mr Kony moved allegedly to Sudan and after the secession to South Sudan, where he used radio connections to conduct his troops being under his very tough control and supervision both 'politically' and 'religiously'. Disobedience, real or suspected betrayal, violation of internal rules of the movement were severely punished.

One of the characteristics of the LRA manoeuvring on the Northern part of Uganda was the attacks on not at all or poorly defended villages in order to plunder foodstuffs, ammunition and to abduct children. Boys were used first as transporters, than they were progressively taught military skills – often through rather bloody and cruel initiation exercises - in order to become child soldiers with the perspective of becoming once a commandant. Dominic Ongwen himself was an abducted child, getting more and more stars on his shoulders to become a 'general' of a brigade.

Abducted girls became first 'ting-ting's (servants, but in fact, domestic slaves) in the household of the LRA commanders. Their du-

520 Kony Case. The Prosecutor v. Joseph Kony

ties consisted of taking care of their master's children, helping their 'wives', cleaning and cooking, etc. When they reached their maturity (this often happened as early as at the age of twelve or thirteen), they were attributed as 'wife' to meritorious soldiers and commanders, who often were not even twenty years old.

It was mentioned by several witnesses during the Ongwen-trial that Kony *i.* wanted to set up a new generation ready to rule the region according to his beliefs and prophesies; *ii.* reserved for himself the nicest girls and he was living with a *de facto* harem composed of forty to eighty wives on the Sudanese basis; *iii.* aimed to reward his followers by offering them 'wives'; *iv.* was afraid of AIDS and other venereal diseases, which explains why he had young girls abducted who had no previous sexual relationship; *v.* prohibited extra-conjugal sexual relationships for the same reason. *vi.* The LRA did not ask the girl's consent for the marriage. If her 'husband' died in a battle, she had to remarry after a certain mourning period but at that time, her consent was already asked for. However, she could not stay a widow and she was not allowed to leave the LRA.

The Trial Chamber concluded to Dominic Ongwen's criminal responsibility in several types of crimes committed against children, (i.e. child soldering, enslavement, rape, sexual slavery, forced pregnancy and forced marriage as other inhuman act.). Moreover, several children were victims of murder, perpetrated during the attacks against four villages, namely Abok, Lukodi, Odek, Pajule. Mr Ongwen's criminal responsibility was also established for several other crimes, not related to children.[521]

### 3.2. The question of transgenerational harms

The question of transgenerational harms was first put on the table in the reparation case of Germain Katanga's victims; later and more substantially, in the reparation case of Bosco Ntaganda's victims. Both cases were linked to the civil war in the Ituri province of the

521 The Prosecutor v. Dominic Ongwen, International Criminal Court, 2021ab; International Criminal Court, 2021w; International Criminal Court, 2021x.

Democratic Republic of Congo and the latter case included rapes and sexual abuses perpetrated against the civilian population as well as against girls involved in the practice of child-soldering.

The phenomenon of transgenerational harms was first circumscribed historically in post WW II time, when children (and eventually much later born descendants as well) of former concentration camp prisoners or of Jewish people ghettoized or hiding from persecution presented similar, mostly psychological distress symptoms, even if they were born in peaceful, normal and safe conditions. The scientific community elaborated two approaches to explain this phenomenon.

The first approach is generally called *epigenetic school* because it explains the long term effects by genetic transformations due to malnutrition, suffered corporal and mental harms and in some cases also due to the consequences of the nazis' human experiments performed in some KZ camps. The second approach is the so called *social/behavioural school*, putting emphasis on the social transmission of fears and feelings manifested in automatic reactions appearing in people who *in personam* were not deported or ghettoized but who behave and react in the same manner as their persecuted fellows or family members.

These two schools, that I tried to present in a very simplified manner, have followers concerning new mass crimes perpetrated in the last decades in different points of the globe.

Even if in WW II cases both schools agreed that males having suffered personal, physical or other harms could also be transmitters of the phenomenon, nevertheless in the cases before the ICC the symptoms are linked with SGB crimes (rape, sexual slavery, forced marriage) suffered during recent armed conflicts.

In the Germain Katanga's victims' reparation case, the acting trial chamber first refused to enter in the examination of transgenerational harms eventually suffered. It argued that taking into account the divided nature of this scientific branch (i.e. the two schools and the applicability of their approaches in a not WW II context), it does not consider itself qualified to pass a decision on the matter, much less in case the given persons are eligible for reparation on

other ground. The Appeals Chamber gave however right to the victims' representative and instructed the trial chamber to revisit the question.[522] Although the Trial Chamber went through the most important teachings of the two schools in the new order, the decision was again negative. As Mr Katanga was acquitted from the charges of rape and his liability was established 'only' concerning his assistance to the massacre of Bogoro village, the Trial Chamber concluded that the causal nexus had not been established between the psychological harm suffered and the crimes for which Mr Katanga was convicted.[523]

However, due to differences between the Germain Katanga and Bosco Ntaganda cases and especially to the fact, the Ntaganda's liability was also established concerning rape committed by soldiers under his command, the order in Bosco Ntaganda's victims' reparation case is truly important. Amending the order of 2021[524] upon the instruction of the Appeals Chamber[525] , the order delivered

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522 International Criminal Court, 2018h, § 260, pp. 110-111:
"260. The Appeals Chamber recalls that, in this case, the Trial Chamber assessed all applications for reparations individually with a view to determining whether the applicants were victims and the harm suffered. These determinations were then the basis for awarding symbolic individual as well as collective reparations. While the Appeals Chamber has expressed concerns about this approach in this case, it has not found that it amounted to an error of law or an abuse of discretion. In these circumstances and bearing in mind that the number of applications alleging transgenerational harm is low, the Appeals Chamber considers it appropriate that these applications be reassessed. Thus, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the Five Applicants and to remand the matter to the Trial Chamber, which has detailed knowledge of the case, for it to reassess the question of the causal nexus between the crimes for which Mr Katanga was convicted and their psychological harm and whether they should be awarded reparations".

523 International Criminal Court, 2019l, §§ 9-14, pp. 8-10:
"141. On the basis of the foregoing, the Chamber considers that the evidence brought in support of the applications for reparations assessed above does not establish, to the standard of proof of a balance of probabilities, the causal nexus between the psychological harm suffered and the crimes of which Mr Katanga was convicted".

524 International Criminal Court, 2021y.

525 International Criminal Court, 2022q.

in 2023[526] presents the two main schools[527] and points out that in 2021, "when defining the types of harm suffered by the victims, it considered all relevant information before it and concluded that the children of direct victims suffered transgenerational harm,"[528] and the order "did not restrict transgenerational harm to psychological harm only. Accordingly, children of direct victims who can demonstrate to have suffered transgenerational harm should be provided with collective reparations with individualised components, to the extent of the individual harm suffered as a result of the crimes for which Mr Ntaganda was convicted."[529]

In order to be recognized a victim eligible to reparation for transgenerational harms, the given applicant has to undergo a case-by-case assessment because transgenerational harms cannot be presumed.[530] However, the other presumptions of the reparation procedure do apply.[531]

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526 International Criminal Court, 2023p. (In the followings: Addendum, Ntaganda victims' reparation, 2023).

527 Addendum, Ntaganda victims' reparation, 2023, pp. 71-75, §§ 174-175.

528 Addendum, Ntaganda victims' reparation, 2023, p. 78, § 183.

529 Addendum, Ntaganda victims' reparation, 2023, p. 78, § 184.

530 Addendum, Ntaganda victims' reparation, 2023, p. 79, § 185:
"185. In concrete terms, a child of a direct victim claiming to have suffered transgenerational harm, would generally need to prove (i) that a direct victim suffered harm as a result of a crime for which Mr Ntaganda was convicted; (ii) that the child of the direct victim suffered harm; (iii) that the child's harm arises out of the harm suffered by the direct victim, i.e., the causal link; and (iv) a parent-child relationship. As to the evidence required to prove the elements above, the Chamber considers that the same evidentiary criteria applicable in order to prove identity, the harm suffered, and the causal link between the crime and the harm, as for any other victims in the case, applies to victims claiming transgenerational harm".

531 Addendum, Ntaganda victims' reparation, 2023, p. 79, § 186:
"186. Regarding the first two requirements, i.e., harm of the direct victim and harm of the direct victim's child, the Chamber considers that, although no presumption of transgenerational harm applies, the general factual presumptions established in the Reparations Order to the extent that are not affected by the Appeals Judgment still apply, meaning that, once direct victim status has been proven, (i) children of former child soldiers and of victims of rape and sexual slavery benefit from the presumption of material, physical, and psychological harm in relation to them (as close family members) and

All these considerations were crowned by a solemn tribute paid to children's sufferings: "(...) the Chamber finds it essential to acknowledge the existence of the phenomenon of transgenerational harm and the personal suffering that children of victims of unimaginable atrocities may also experience. In the view of the Chamber, this approach is further justified in light of the fundamental principle of the 'best interests of the child', which should guide reparations decisions concerning children. A sensitive approach to the rights of children that – while ensuring that the rights of the convicted person are fully respected – also carefully promotes the protection of children and recognises the distinct personal harm that they may have suffered, in itself, may already constitute a measure of satisfaction."[532]

### 3.3. The perception of the accused's own child-soldier past

The sentence condemning Mr Ongwen to 25 years of imprisonment[533] gave particular importance to the issue whether – and if yes, in what measure – Ongwen's own child-soldier past and 'socialization' within the LRA since 1987 (when he was probably nine years old) could be considered as a mitigating factor, as the defence suggested. (The charged period concerned however 2002-2005, when he was definitely well over 18.)

As the Trial Chamber emphasized "[o]n the basis of all the available evidence, it is evident to the Chamber that Dominic Ongwen's abduction at the age of around nine years and subsequent early years in the LRA brought to him great suffering, and led to him missing out on many opportunities which he deserved as a child. (...) It

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in relation to their parents (as direct victims); (ii) children of direct victims of attempted murder and of direct victims of crimes committed during the attacks who personally experienced the attacks, benefit from the presumption of psychological harm in relation to their parents (as direct victims); and (iii) children of direct victims who lost their home or material assets with a significant effect on their daily life, benefit from the presumption of psychological harm in relation to their parents (as direct victims)".

532 Addendum, Ntaganda victims' reparation, 2023, p. 84, § 195.

533 International Criminal Court, 2021z. (In the following: Ongwen, sentence)

is clear that Dominic Ongwen suffered following his abduction into the LRA, even though – as found in the Trial Judgment – this trauma did not lead to a mental disease or disorder and had no lasting consequences from that viewpoint."[534] "At the same time, the Chamber cannot ignore that the evidence laid out above, specifically concerning various time periods between Dominic Ongwen's abduction in 1987 and 2002, the beginning of the period of the charges, indicates that whereas during the first years following his abduction, Dominic Ongwen's stay in the LRA was extremely difficult, he was soon noticed for his good performance as a commander – already in the mid-1990s, at approximately 18 years old. His adaption into the LRA, including with its violent methods, indeed occurred relatively early. (...)"[535]

"(...) the Chamber deems that Dominic Ongwen's personal history and circumstances of his upbringing, since his young age, in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, his socialisation in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence. The present considerations must therefore be read as incorporated into the individual assessments conducted below concerning each crime."[536] "(....) Dominic Ongwen's abduction and early experience in the LRA constitute specific circumstances bearing a significant relevance in the determination of the sentence, which shall be carefully balanced with all other relevant factors and circumstances in order to determine the most appropriate individual sentence for each of the crimes of which Dominic Ongwen was convicted. In approximate terms, and as a broad indication, the Chamber considers the Prosecution's recommendation to consider these circumstances as warranting 'approximately a one-third reduction', in the length of the sentences that, in their absence, Dominic Ongwen would otherwise receive,

534 Ongwen, sentence, § 83, p. 33.
535 Ongwen, sentence, § 84, p. 33.
536 Ongwen, sentence, § 87, p. 35.

to be generally fitting and reasonable – obviously depending on the particulars of each crime."[537]

The Defence submitted an appeal against the conviction and the sentence, but the Appeals Chamber approved the Trial Chamber's judgments, and it did not find any error in the legal argumentation.[538]

## 3.4. The issue of children's unlawful deportation or transfer

### 4.3.1. The issue of children's unlawful deportation in the 'situation in Myanmar'

In the 'situation of Myanmar' concerning the deportation of seven to eight hundred thousand Rohingyas, a local Muslim community, the Pre-Trial Chambers were confronted with the assessment of a situation where, according to the Prosecutor, allegedly due to the Myanmarian army's action, several hundred thousand had to flee to the neighbouring Bangladesh in order to save their life and seek refuge. The forced exodus concerned not only whole families but often whole villages.

The importance of the first Rohingya decision is linked to the fact that the Pre-Trial Chambers confirmed the Prosecutor's position namely that if one of the constitutive elements of a crime is committed on the territory of a State Party, the jurisdictional competence of the Court concerns also the elements that occurred on the territory of a non-State Party.[539] In the second decision authorizing

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537 Ongwen, sentence, § 88, p. 35.

538 International Criminal Court, 2022ab; International Criminal Court, 2023q; International Criminial Court, 2022ac.

539 International Criminal Court, 2018b, § 73, p. 42:
"In the light of the foregoing, the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute. It follows that, in the circumstances identified in the Request, the Court has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh, provided that such allegations are established to the required threshold. This conclusion is without prejudice to subsequent findings on jurisdiction at a later stage of the proceedings".

the Prosecutor to investigate, the other Pre-Trial Chamber made references on children but only through the recapitulation of victims' statements.[540]

### 4.3.2. The issue of children's unlawful deportation or transfer in the 'situation in Ukraine'

In the context of the war launched by Russia against Ukraine in 2022, the Pre-Trial Chamber II granted the Prosecutor's request for arrest warrants for alleged perpetrators of unlawful transfer or deportation. As it is well known, these arrest warrants concern president Mr Vladimir Putin and the ombudsperson for children, Mrs Maria Lvova-Belova. For the time being, the only publicly accessible documents of the ICC are the press-releases issued on the decision[541]

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540 International Criminal Court, 2019f, § 29, 37, 81, 107, pp. 14, 18, 38, 49:
"Victims' representations also mention that children were often targeted and killed, including small children who were thrown into water or fire to die. Victims' representations refer to entire families being torched after perpetrators locked them in their homes." (...) "As noted above, victims' representations mention that perpetrators purposely targeted children and that sexual violence, often committed in a brutal manner, was prevalent." (...)"As a result of these indiscriminate shootings, numerous Rohingya, including many children, were reportedly killed or injured, many whilst fleeing." (...)" According to the material submitted, most of the Rohingya interviewed in refugee camps in Bangladesh wish to return to Myanmar,240 but expressed concerns about their safety and citizenship rights. Many stated that they would return only if they were treated with dignity, including respect for their religion, their ethnic identity, the return of their possessions, and a sustainable future for their children".

541 International Criminal Court, 2023b:
"Today, 17 March 2023, Pre-Trial Chamber II of the International Criminal Court ("ICC" or "the Court") issued warrants of arrest for two individuals in the context of the situation in Ukraine: Mr Vladimir Vladimirovich Putin and Ms Maria Alekseyevna Lvova-Belova.
Mr Vladimir Vladimirovich Putin, born on 7 October 1952, President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Mr Putin bears individual criminal responsibility for the aforementioned crimes, (i) for having committed

followed by the Prosecutor's statement[542] and a video message of the

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the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute), and (ii) for his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility (article 28(b) of the Rome Statute).

Ms Maria Alekseyevna Lvova-Belova, born on 25 October 1984, Commissioner for Children's Rights in the Office of the President of the Russian Federation, is allegedly responsible for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). The crimes were allegedly committed in Ukrainian occupied territory at least from 24 February 2022. There are reasonable grounds to believe that Ms Lvova-Belova bears individual criminal responsibility for the aforementioned crimes, for having committed the acts directly, jointly with others and/or through others (article 25(3)(a) of the Rome Statute).

Pre-Trial Chamber II considered, based on the Prosecution's applications of 22 February 2023, that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.

The Chamber considered that the warrants are secret in order to protect victims and witnesses and also to safeguard the investigation. Nevertheless, mindful that the conduct addressed in the present situation is allegedly ongoing, and that the public awareness of the warrants may contribute to the prevention of the further commission of crimes, the Chamber considered that it is in the interests of justice to authorise the Registry to publicly disclose the existence of the warrants, the name of the suspects, the crimes for which the warrants are issued, and the modes of liability as established by the Chamber.

The abovementioned warrants of arrests were issued pursuant to the applications submitted by the Prosecution on 22 February 2023".

542 International Criminal Court, 2023c:

"(...) Incidents identified by my Office include the deportation of at least hundreds of children taken from orphanages and children's care homes. Many of these children, we allege, have since been given for adoption in the Russian Federation. The law was changed in the Russian Federation, through Presidential decrees issued by President Putin, to expedite the conferral of Russian citizenship, making it easier for them to be adopted by Russian families. My Office alleges that these acts, amongst others, demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian children were protected persons under the Fourth Geneva Convention. We also underlined in our application that most acts in this pattern of deportations were carried out in the context of the acts of aggression committed by Russian military forces against the sovereignty and territorial integrity of Ukraine which began in 2014. In

ICC President.[543]

The issue of these children is extensively covered in the international press and also in some documents of international organizations[544], however, at the time of the writing of the present article, no other public document was released by the ICC on the matter.

## 4. THE TRUST FUND FOR VICTIMS AND CHILDREN

This special half-autonomous organ of the institutional complex of the ICC deals under two mandates with the needs of victims, many of them children. Under the reparation mandate, the Trust Fund manages the victims' reparation when the perpetrator is convicted. The condemned person is liable for the whole costs of reparation, however, pending his insolvency – which has always been the case so far – the Trust Fund 'advances' a reasonable sum collected from states and private donors and it conducts the reparation services through hospitals, sick-bays and educational institutions.

The activity under assistance mandate is linked with an ICC *'situation'* but not with a given ICC *'case'* and it does not presuppose the perpetrator's condemnation.

This means that victims of events that *ratione personae, ratione loci* or *ratione temporis* did not make part of the charges or in case the perpetrator was acquitted, or the case ended for any other reasons

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September last year, I addressed the United Nations Security Council and emphasised that the investigation of alleged illegal deportation of children from Ukraine was a priority for my Office. The human impact of these crimes was also made clear during my most recent visit to Ukraine. While there, I visited one of the care homes from which children were allegedly taken, close to the current frontlines of the conflict. The accounts of those who had cared for these children, and their fears as to what had become of them, underlined the urgent need for action. We must ensure that those responsible for alleged crimes are held accountable and that children are returned to their families and communities. As I stated at the time, we cannot allow children to be treated as if they are the spoils of war. (...)"

543 President Hofmanski's speech is attached at the end of the press release cited *supra*.

544 Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, 2023.

without condemnation (e.g., the death of the person under investigation, etc.) can have nevertheless access to some help financed from the collects.

In spite of the different legal nature of the two mandates and taking into account the sums available, the most urgent needs and their costs, the granted services are very similar and in case of children-victims or ex-children victims like child-soldiers, domestic slaves (*'ting-tings'*), sexually abused or raped children and children born from rape, the services are centered on medical and psychological treatment, education and professional formation necessary for their social integration.[545]

## 5. CONCLUSIONS

Children as vulnerable victims are in the focus of attention at the International Criminal Court. Their enhanced presence in the Rome Statute and other normative texts, the importance attributed the children in case selection and pre-trial and trial management and during reparation and assistance activities is absolutely justified. Their personal tragedy is often a relevant factor of the recurrence of hostilities and their transboundary extensions.

545 See in detail and also with indication of costs in: Trust Fund for Victims, no date; The Trust Fund for Victims, 2021. ; „Democratic Republic of the Congo". Available at: https://www.trustfundforvictims.org/en/locations/democratic-republic-congo (Accessed: December 2023); "Central Arfican Republic". Available at: https://www.trustfundforvictims.org/en/locations/central-african-republic (Accessed: December 2023); "Uganda". Available at: https://www.trustfundforvictims.org/index.php/en/locations/uganda (Accessed: December 2023); "Trust Fund for Victims to Launch Programme in Georgia". Available at: https://www.trustfundforvictims.org/en/news/trust-fund-victims-launch-programme-georgia (Accessed: December 2023)

# CHAPTER VI

# Victims' right to reparation at the International Criminal Court[546]

## 1. INTRODUCTION

The aim of this chapter is to present the main characteristics of the reparation procedure of the victims before the International Criminal Court.[547] Although only a few cases have been finished so far, the approach and the methodology used will certainly have an impact on future reparation procedures. The reader can also see the interaction between classic sources of public international law and norms that can hardly be described in our common legal terms but play a very important role during the procedure: adopted upon mandate given by the Rome Statute, they are more than soft law but less than treaty law.

## 2. STATUTORY AND OTHER NORMATIVE RULES OF THE REPARATION

The order for reparation should be seen from three points of view: *What is the convicted perpetrator's precise scope of liability? What are the practical consequences of the answer given to the previous*

546 The content of the first three subtitles of the present chapter is based on my article entitled 'Victims' Right to Reparation in Light of Institutional and Financial Challenges: The International Criminal Court and the Reparation for the Victims of the Bogoro Massacre', *East European Yearbook on Human Rights*, 2018, (1)1, pp. 100-12; https://doi.org/10.5553/EEYHR/258977642018001001006.

547 For a deeper presentation of the current practice see: Chapitre VI La réparation des victimes in: Kovács, 2023.

*question? How is the reparation order going to be executed and how are its stipulations going to be materialized for the victims?* Before entering into these issues, one should become familiar with the two main bodies dealing with reparations, namely the Trial Chamber appointed by the presidency for a given reparation procedure and the Trust Fund for Victims.

The inter-relationship of these bodies as well as the questions of the reparation procedure are very shortly mentioned in article 75 of the Rome Statute, entitled "reparations to victims".[548]

In 2002, Jorda and de Hemptine considered that article 75 "confers on victims a potential right"[549]". They repeated that "[t]he victim's right to reparation is potential."[550]

As the Case-Matrix Commentary states: " [l]ogically, Article 75 implies that victims possess a right of reparations under international law and that this right can be satisfied in the framework of

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548 Rome Statute, Article 75, Reparations to victims:
"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law".

549 Jorda, Hemptinne, 2002, p. 1406.

550 Jorda, Hemptinne, 2002, p. 1407.

international criminal proceedings (...) A general concern, however, is that the perpetrator-centered reparation regime, which is also complex and requires expert advice, might create hierarchies or dividing lines among victims who fall inside or outside of the regime ."[551] The preparatory works (*travaux préparatoires*) prove that "[t]he legal principles and procedures for reparations in Article 75 are outlined only in very general terms and it was clear that implementing provisions were necessary in the Rules of Procedure and Evidence."[552]

As we will see later, article 79 – hidden under the subtitle "Penalties" – contains a reference to the Trust Fund[553] and is thus equally important from the point of view of the reparation due to the victims.

The Rules of Procedure and Evidence is more eloquent in the matter when it provides a definition of the victims[554], calls for the observance of their interests[555] and lays down some procedural

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551 Friman, 2016

552 Friman, 2016.

553 Rome Statute, Article 79, Trust Fund:
"1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties".

554 Rules of Procedure and Evidence, Rule 85. Definition of victims:
"For the purposes of the Statute and the Rules of Procedure and Evidence:
(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes".

555 Rules of Procedure and Evidence, Rule 86, General principle:
"A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence".

principles[556] , e.g. how a claim shall be formulated[557], what happens in case of an *ex officio* reparation initiative[558], what type of

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556 Rules of Procedure and Evidence, Chapter 4. Provisions relating to various stages of the proceedings, Section III. Victims and witnesses, Subsection 4. Reparations to victims

557 Rules of Procedure and Evidence, Rule 94, Procedure upon request:
"1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:
(a) The identity and address of the claimant;
(b) A description of the injury, loss or harm;
(c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
(d) Where restitution of assets, property or other tangible items is sought, a description of them;
(e) Claims for compensation;
(f) Claims for rehabilitation and other forms of remedy;
(g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.
2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3".

558 Rules of Procedure and Evidence, Rule 95, Procedure on the motion of the Court:
"1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.
2. If, as a result of notification under sub-rule 1:
(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;
(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim".

reparations may be pronounced by the Court[559] and when, where and how the Trust Fund is involved.[560]

On the basis of § 3 of article 79 of the Rome Statute, the Assembly of States parties issued a comprehensive regulation for the Trust Fund[561] containing 79 rules. These rules are structured in "parts" and "chapters" with several cross-references.[562]

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559 Rules of Procedure and Evidence, Rule 97, Assessment of reparations:
"1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person".

560 Rules of Procedure and Evidence, Rule 98, Trust Fund:
"1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79".

561 International Criminal Court, 2005.

562 Let us call the reader's attention on the Chapters of Part III, intitled "The activities and projects of the Trust Fund" , significant from the point of view of the basic aim of the present article. (Chapter I: Use of Funds; Chapter II:

What is the legal relevance of this regulation? *Prima facie*, the traditional perception of international law denies that it could enjoy legally binding force.[563] We shall see, however, that the situation is much more complex, and it cannot be given an adequate description using the simple reference to the "applicable law" according to article 21 of the Rome Statute.[564]

Moreover, it is worth mentioning that the Trust Fund for Victims the idea of which "emerged as a safety net for the realization of justice for victims under the ICC jurisdiction"[565] enjoys a genuine autonomy[566] within the Court and vis-à-vis its chambers: this autonomy is confirmed in case of the so called resources made up from fines and forfeiture from the convicted person[567] but it is even more elaborate in case

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Implementation of the Activities and Project of the Trust Fund; Chapter III: Individual awards to victims pursuant to rule 98(2); Chapter IV: Collective awards to victims pursuant to rule 98(3); Chapter V: Awards to an intergovernmental, international or national organization, pursuant to rule 98(4).)

563 "In 2011, the ASP adopted a resolution on reparations in which States tried to influence the judicial interpretation of article 75 in order to avoid the unlikely scenario that orders for reparations against a convicted person would imply the use of assessed contributions or other direct financial contributions of States Parties. This resolution is, however, not legally binding for the Judges and other Court organs since ASP resolutions are no source of law within the meaning of article 21." Donat-Cattin, 2016, p. 1864.

564 See in this respect Donat-Cattin, who also concludes that "[o]n a separate but connected plain, the rules and regulations pertaining to the effective functioning of the Trust Fund can have a profound significance for the implementation of the principles relating to reparations that will be produced by the Court's jurisprudence." Donat-Cattin, 2016, p. 1870.

565 Balta, 2020, p. 68.

566 After giving a very detailed picture of the preparatory works, Sperfeldt states that "it was recognised that the Court did not have control over the TFV, whose operation was instead a manner for the Assembly of States Parties." Sperfeldt, 2017, p. 376.

567 *Regulations of the Trust Fund* for Victims, Chapter I, Use of Funds:
"Section I Beneficiaries
42. The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.

of the *other resources*, i.e. the voluntary contributions whether coming from states, legal entities or private persons.[568] In the regulations of the Trust Fund for Victims, the role of its Board is emphasized in this context[569] i.e. whether to complement or not to complement the sum

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Section II Resources collected through fines or forfeiture and awards for reparations

43. When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the Rules of Procedure and Evidence, the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s).

44. Where no further stipulations or instructions accompany the orders, the Board of Directors may determine the uses of such resources in accordance with rule 98 of the Rules of Procedure and Evidence, taking into account any relevant decisions issued by the Court on the case at issue and, in particular, decisions issued pursuant to article 75, paragraph 1, of the Statute and rule 97 of the Rules of Procedure and Evidence.

45. The Board of Directors may seek further instructions from the relevant Chamber on the implementation of its orders.

46. Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person".

568 *Regulations of the Trust Fund* for Victims, Section III, Other resources of the Trust Fund:

"47. For the purpose of these regulations, "other resources of the Trust Fund" set out in of rule 98, paragraph 5, of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeitures.

48. Other resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes".

569 Regulations of the Trust Fund for Victims: "54. When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4, of the Rules of Procedure and Evidence, the Secretariat shall prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors.

55. Subject to the order of the Court, the Trust Fund shall take into account the following factors in determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature

constituted from imposed fines and forfeiture. [570] (See on this e.g. Kai Ambos[571], Tom Dannenbaum[572], Thordis Ingadottir[573], Miriam Cohen[574] and Edith-Farah Elassal[575] etc.)

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of the evidence to support such injuries, as well as the size and location of the beneficiary group.

56. The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards".

570 "A more fundamental point is the absence of any provision in the Rules for automatic intervention by the Trust Fund in the event of the accused's absence or insolvency: the award of compensation to victims will thus remain shrouded in uncertainty." Jorda, Hemptinne, 2002, p. 1415.

571 Kai Ambos: "The TFV thus is free to decide whether or not to exercise its reparation mandate." Ambos, 2016, p. 199.

572 "In sum, the Statute leaves the regulation of the TFV firmly in the hands of the ASP. The ASP, in turn, has passed regulations that make it explicitly clear that the "other resources" of the TFV are funds over which the Board of the TFV has control and over which the Court itself has no control. The Court is provided only the limited opportunity to object on very narrow grounds. Any amendment to this apportioning of responsibility would require the approval of the ASP." Dannenbaum, 2010, p. 255.

573 "The Trust Fund is not obliged to make an award of reparations from the Trust Fund. That is to say it does not have to use other funds to supplement insufficient awards of reparations collected from the convicted person." Ingadottir, 2001, p. 15.

574 "In this light, the ICC Statute is not only innovative because it has incorporated the possibility for victims of the crimes within the jurisdiction of the ICC to claim reparation within international criminal justice, but also in its approach to the reparation mechanism, by the creation of an independent administrative mechanism connected to the Court, the TFV. (...) From the above-mentioned provisions, it stems clearly that the TFV is not a judicial mechanism that deals with reparations, but rather an administrative mechanism linked to a judicial procedure (the ICC proceedings). It is a kind of complementary organ of the Court and an integral part of the reparative scheme set up by the ICC. The TFV is independent from the Court." Cohen, 2013, pp. 250-251.

575 „La seconde observation que suscite la norme 56 concerne le pouvoir discrétionnaire du Conseil de direction. À nouveau le langage est clair. Une chambre ne pourra ordonner de son propre chef l'utilisation des ressources

It should also be kept in mind that currently (and presumably for a long time to come) the envelope of the resources collected from fines and forfeiture is rather small due to the lack of financial capacities of most of the up to now convicted persons. It had been empty for a long time. In 2023, it was 330 000 euros.[576] which was due to the fines imposed in the Prosecutor v. Bemba et al. case. That's why – regarding the considerable costs of medical, psychological and educational reparation etc. - the costs of the reparation programs should inevitably[577] be found in the *"other resources"*.

The problem is, as Sperfeldt puts it, that "a broad human rights-inspired concept of reparations was introduced into a system that strictly adhered to the bedrock of criminal law – the notion of individual responsibility – that translated in the reparations realm to individual liability for the harm that resulted from crimes adjudicated before the Court. This imbalance constitutes one of the main challenges today for creating a system that can actually deliver reparations in the context of mass atrocities. Such a model is at risk of raising expectations among victims of a potential of reparations that are at odds with the means and resources at the Court's disposal."[578]

Manirabona and Wemmers remind States their responsibility to give the Trust Fund for Victims financial support[579]. Mia Swart puts

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du Fonds – organisme indépendant– pour donner vie à une ordonnance de réparation. Ainsi, la Chambre de première instance peut rendre une ordonnance. Il reviendra ensuite au Conseil de direction du Fonds de décider s'il souhaite (et s'il peut) compléter le fruit de l'ordonnance en raison de l'indigence du condamné." Elassal, 2011, p. 306.

576 Tavararez Mirabal, 2023, p. 67.

577 Jorda and de Hemptinne saw the problem already in 2002: " (...) it will be necessary for the Trust Fund to have sufficient resources available to meet all such needs; it will be clearly impossible to meet those needs solely from the proceeds of fines and forfeited assets, and a specific budget will have to be voted in that regard." Jorda, Hemptinne, 2022, p. 1415.

578 Sperfeldt, 2017, p. 373.

579 "However, as we saw above, the Rome Statute provides that if the ICC is incapable of providing reparation, the Trust Fund can offer alternative reparation. But the Trust Fund is grossly underfunded, something that displays a massive gap between the legal rights of victims to reparation, and the actual resources available to them. Here, there is a duty for the State Parties to the Rome Statute of the ICC, as well as the whole international community, to provide adequate

that the governments' eagerness to contribute may depend on the existence of a comprehensive reparations policy.[580]

Dannenbaum adds that under the current conditions, the use of the other resources should be reserved for the assistance mandate and should not be used for the purposes of the reparations mandate.[581] As you will see in the following pages, nowadays' practice is just the opposite. This seems to be the only way to secure effective reparations to victims.

## 3. DISTINCTION BETWEEN ASSISTANCE MANDATE AND REPARATION MANDATE OF THE TRUST FUND FOR VICTIMS

Why is the distinction between assistance mandate and reparation mandate so important?

It is to be noted that the Trust Fund for Victims is present in several situation countries also (and primarily) through its *assistance*

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resources to the Trust Fund in order to provide effective redress including compensation and rehabilitation for war victims." Manirabona, Wemmers, 2013, p. 1007.

580 "A comprehensive reparations policy will be attractive both to victims as well as to potential donor countries that will be approached to contribute funds to the TFV. State parties may also feel more comfortable contributing money to the Trust Fund if they knew that there is a comprehensive and principled reparations policy in place." Swart, 2012, p. 188.

581 "Such Court ordered reparations should be funded only by the wealth of the criminal against whom those reparations are ordered and by other Court-generated resources, such as fines and forfeitures. Neither is the TFV legally obliged to use its "other resources" to supplement Court-generated funds in order to meet the Court's reparative assessment, nor would such use of the TFV's resources be optimal." (....) 'Instead, the TFV should take full advantage of its legal freedom by engaging in reparative projects that seek to benefit and acknowledge those victims that are unlikely to be reached by the Court's Article 75 reparations process. This freedom, of course, is not limitless. The governing legal texts require that the TFV restrict its projects to those benefiting victims of crimes that fall within the ICC's jurisdiction, and as a matter of policy the Fund should direct its activities to situations 5 in which the prosecutor has issued indictments in which the prosecutor has issued indictments. However, within those confines, the Fund enjoys great discretion, and it is in the interest of transitional justice that it should exercise that discretion without restraints of the kind currently imposed by the Court." Dannenbaum, 2010, p. 236.

*mandate* activity. Contrary to the activities engaged under reparation mandate, assistance mandate activity does not require a previous condemnation and may also cover persons who – although they are victims – are not directly concerned by a given crime for which a concrete person was convicted by the ICC.[582]

This means in practice that the Trust Fund may act before the end of the lengthy procedure and also vis-à-vis persons who might have been victims of other perpetrators against whom legal procedure was not opened (or if it was, it got stopped) by the Prosecutor (e.g. because of death, lack of adequate, accessible evidence or because of the relatively minor importance of the crime) or who were acquitted because there was no sufficient proof for the conviction beyond any reasonable doubt or the link of causality could not be duly proven between the harm suffered by the given individual and the convicted person.

As Dutton and Ní Aoláin put it "the assistance mandate is a vital intermediate engagement with the victims of systematic human rights violations, preparing them to better engage with the demands of international criminal justice - in addition to the benefits of beginning the healing process earlier. What this means in practice is that the earlier the intervention which engages directly with trauma and the direct physical and psychological legacies of violence for victims will be more likely to ensure that victims can move forward positively with their lives."[583]

However, in spite of a few similarities, the assistance mandate cannot be considered as equivalent to 'transformative reparation' or 'transformative justice'.[584]

The autonomy of the Trust Fund also prevails in case of activities under assistance mandate: it is an *ex officio* decision to launch such a program, pending a kind of a veto right on behalf of the competent chamber.[585] In practice, there were mostly major medical, psychological and educational projects that have been launched so far

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582 In this sense: Ambos, 2016, pp. 199-200.

583 Dutton, Ní Aoláin, 2019, p. 547.

584 Leyh, Fraser, 2019, pp. 56-58.

585 *Regulations of the Trust Fund* for Victims, 50. "For the purposes of these regulations, the Trust Fund shall be considered to be seized when:

under assistance mandate in the Democratic Republic of Congo[586], Uganda[587], Côte d'Ivoire[588], Kenya[589], the Central-African Republic[590] and Georgia[591].

## 4. THE VICTIMS' ELIGIBILITY IN THE ORDER FOR REPARATION

It was necessary to give a brief outlook concerning this very complicated – or with Moffett et Sandoval's word[592] *'quixotic'* – system in order to understand why the few reparation procedures took such a long time. In fact, *stricto sensu* reparation procedures were launched in favour of the victims of *i.* the Lubanga[593],

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(a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and
(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
(iii) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities."

586 The Trust Fund for Victims, 2016, pp. 19-20.
587 The Trust Fund for Victims, 2016, pp. 20-21.
588 International Criminal Court, 2017e.
589 The Trust Fund for Victims, no date, p. 5.
590 "Central African Republic". Available at: https://www.trustfundforvictims.org/en/locations/central-african-republic (Accessed: December 2023)
591 The Trust Fund for Victims, no date, p. 5.
592 Moffett, Sandoval, 2021, p. 749., p. 769.
593 International Criminal Court, 2017f. (In the followings: Lubanga reparation, 2017)

Katanga[594] and Bosco Ntaganda[595] cases all linked with the civil war in the Ituri province of the Democratic Republic of Congo. *ii.* the Al Mahdi[596] case, linked with the destruction of the historical monuments of Timbuktu in Mali by the Islamists' rule in 2012. *iii.* the Dominic Ongwen case. While during the elaboration of this chapter in 2023-2024, the reparation in the Lubanga, Katanga and Al Mahdi cases has already been fully accomplished, in the Dominic Ongwen case, the recently adopted ordonnance defining the eligible and the forms and amount of the reparation[597] is waiting for execution. Some preparatory steps have been taken in the Jean-Pierre Bemba Gombo case[598] by its trial chamber but after the acquittal in appeal, the procedure had to be stopped and transformed into programs under assistance mandate in the Central-African Republic.[599]

Although the reparation procedure is closely linked with a case that ended with the perpetrator's condemnation for the committed crime, the circle of the victims eligible for reparation will not be forcibly identical with that of the 'participating victims' of the judicial procedure or with that of the 'situation' victims. If an individual's personal tragedy and suffered harms in a *situation* falling under the ICC's jurisdiction do not coincide with the *ratione loci, ratione temporis, ratione materiae* or *ratione personae* parameters of a 'case',

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594 International Criminal Court, 2017g. (In the followings: Katanga reparation order 2017)

595 International Criminal Court, 2021y.

596 International Criminal Court, 2017h. (In the followings: Al Mahdi reparation, 2017)

597 International Criminal Court, 2024. (In the followings: Ongwen reparation, 2024)

598 Available at: https://www.trustfundforvictims.org/en/news/press-release-following-mr-bemba%E2%80%99s-acquittal-trust-fund-victims-icc-decides-accelerate-launch (Accessed: September 2023)

599 "At the ICC, the Trust Fund stepped in just after the acquittal in the Bemba case in the summer of 2018 and indicated that it intends to provide some redress to victims admitted as such in the Bemba proceedings through its assistance mandate; It is hoped that beginning in the latter half of 2019, victims will thus be able to receive some redress for the harm they suffered (as recognised by the Trial Chamber) despite the Bemba proceedings having ended in an acquittal." Ambach, 2019, p. 142. See also: Leyh, Fraser, 2019, p. 52.

this person will not be entitled to reparation, which should be *ex lege* the condemned person's obligation according to the text of the Rome Statute. This does not mean however that they cannot be embraced by the rehabilitation programs of the 'assistance mandate'.

The fact that a 'situation victim' may be out of the scope of the reparation can be due to the fact that the given village or the given attack were not selected by the Prosecutor, who had to submit a precise case with sufficient probatory evidence against identified perpetrators. Some of the 'participating victims' may fall out if the accused person will be acquitted from the charges or at least from those which concern directly or indirectly the given person. It can also happen that it becomes clear that the given victim does not satisfy the material criteria of falling under a given crime. (e.g. he was older than fifteen, which is the mandatory age for child-soldiering under the Rome Statute).

In the enthusiastic atmosphere of the diplomatic conference in Rome, the representatives of the governments did not foresee how difficult the realization of the reparation will be when *i.* mass crimes have been committed *ii.* in countries where the functioning of public administration – and, in particular, that of public registers on identity, immobile property – is hampered by former or current events of civil war *iii.* by people having no real income to cover the costs of the reparation of harms produced by their activity or *iv.* when the monetary amount of the reparation is so high (taking into account the victims' number, the costs of medical services etc.) that it is clearly impossible that the condemned perpetrator could cover it from his own existing or potential incomes and properties and *v.* the effective realisation of reparation cannot be done without the contributions of governments and other external donors.

All these factors have an impact on the choice between individual reparations and collective reparations. As Carsten Stahn puts it, "international crimes are typically collective crimes carried out against specific groups or collectivities. In light of this, it makes sense to repair harm to individuals as members of targeted collectivities. (...) Collective reparation is particularly relevant in cultural contexts where the role of the individuals is closely tied to

the role of collectivities, such as families, communities and their environment."[600]

The wishes expressed by the victims being duly taken into account, the decision depends on the given trial chamber, which should also pay attention to the real chances of the execution of the reparation order as well as to the need of securing – if needed – social reintegration and to the prevention of the creation of new social or ethnically coloured conflicts.

All the above aspects appear regularly when applicants' eligibility is assessed, so the jurisprudence of the International Criminal Court had to be shaped accordingly in order to reduce the elapsed time between the commission of a crime and the realisation of a reparation that is not fictious but real. This was not easy, and the ICC was often blamed for being slow and criticized for jurisdictional contradictions. Nevertheless, a certain pragmatic approach seems to have crystallized. In the following paragraphs I will try to summarize the most important issues the reparation procedure has been facing.

In the long list of reparation related decisions, a decision of the Appeals Chamber rendered in 2015 concerning Lubanga's victims has to be mentioned. Leader of a militia[601] composed of essentially Hema ethnicity, Thomas Lubanga Dyilo was charged and condemned for conscripting and using child soldiers between September 2002 and August 2003 in the civil war erupted in Ituri province (at the north-eastern side of the DRC) between the Hema community on the one hand and the Lendu and Ngiti communities on the other.

His condemnation in 2012 for fourteen years of imprisonment was followed by the issuing of a reparation order[602] by the same trial chamber. While the judges expressed their strong

600 Stahn, 2019, p. 403.

601 UPC: l'Union des Patriotes Congolais. FPLC: la Force patriotique pour la libération du Congo.
The FPLC was the military wing of the UPC.

602 International Criminal Court, 2012b. (In the followings: Lubanga, reparation, principles, 2012)

preference for collective reparation[603] and reserved the right of oversight[604] given Lubanga's indigence, the order restricted his contribution to an eventual apology[605], but imposed the obligation to cover the victims' reparation on the Trust Fund for Victims.[606]

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603 "219. Given the uncertainty as to the number of victims of the crimes in this case - save that a considerable number of people were affected - and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.
220. Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities.
221. When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis. The Court should consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training." Lubanga, reparation, principles, 2012, §§ 219-221, p. 75.

604 "289. The Chamber accordingly:
a. Issues the above principles on reparations pursuant to Article 75(1) of the Statute;
b. Decides not to examine the individual application forms for reparations and instructs the Registry to transmit to the TFV all the individual application forms received thus far;
c. Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3) (a) of the Statute (including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval); and
d. Otherwise declines to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions." Lubanga, reparation, principles, 2012, § 289, p. 93.

605 "269. The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order."
Lubanga, reparation, principles, 2012, § 269, p. 88.

606 "270. As regards the concept of "reparations through the Trust Fund", and applying the Vienna Convention on the Law of Treaties, the Chamber gives the word "through" its ordinary meaning, namely "by means of". Thus, when

Both the defence and the representatives of the victims submitted an appeal against the order and the Trust Fund for Victims also expressed criticism concerning the impediments on its statutory autonomy. While rejecting most of the complaints, the Appeals Chamber shared the concerns of the Trust Fund for Victims, as it can be seen in the Key findings of the judgment.

As the first paragraph of the Key findings puts "[a]n order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it;

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Article 75(2) of the Statute provides that an award for reparations may be made "through" the Trust Fund, the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award.

271. Moreover, the Chamber is of the view that when the convicted person has no assets, if a reparations award is made "through" the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources. This interpretation is consistent with Rule 98(5) of the Rules and Regulation 56 of the Regulations of the TFV. Rule 98(5) of the Rules provides that the Trust Fund may use "other resources" for the benefit of victims.

Regulation 56 of the Regulations of the TFV imposes an obligation on the TFV's Board of Directors to complement the resources collected from a convicted person with "the other resources of the Trust Fund", providing the Board of Directors make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and (4) of the Rules. In the Chamber's view, the wording of Regulation 56 of the Regulations of the TFV suggests that the "need to provide adequate resources" includes the need to fund reparation awards. In circumstances when the Court orders reparations against an indigent convicted person, the Court may draw upon "other resources" that the TFV has made reasonable efforts to set aside." Lubanga, reparation, principles, 2012, §§ 270-271, pp. 88-89.

and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted."[607]

The Key findings also confirmed the institutional[608] and decision-making of the Trust Fund for Victims autonomy in budgetary issues[609]. The Appeals Chamber emphasized that "[a] convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."[610] It added that the Trust Fund may advance[611] the costs. In case of collective reparations, the Key findings recognized the Chamber's liberty not to assess the individual applications[612] but pending that the effective beneficiary himself also falls

607 International Criminal Court, 2015c, § 1, p. 7. (In the followings: Lubanga, reparation, appeal, 2015).

608 "For purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers. To the extent that a Trial Chamber issues an order for reparations that impinges on the management of the Trust Fund's finances, resolutions of the Assembly of States Parties in this regard must be taken into account and are to be considered an authoritative source for purposes of interpreting the Regulations of the Trust Fund." Lubanga, reparation, appeal, 2015, § 2, p. 7.

609 "The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's "other resources" for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors." Lubanga, reparation, appeal, 2015, § 4, p. 7.

610 Lubanga, reparation, appeal, 2015, § 6, p. 8.

611 " In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its "other resources" pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund." Lubanga, reparation, appeal, 2015, § 6, p. 8.

612 "When only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. The determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards. Such a determination

in the cercle of victims of the crimes for the commission of which the indictee was condemned.[613]

In the Katanga' victims' reparation case, the antecedents go back to the massacre of the village of Bogoro in the north-eastern Ituri region of the Democratic Republic of Congo, occurred on the 24th of February 2003 and perpetrated by militias composed of Lendu and Ngiti ethnicities against mostly inhabitants belonging to the Hema community. Although the Trial Chamber opted for an individual reparation scheme and made an individual assessment of the applications as to the eligibility and as to the harms suffered, the Appeals Chamber – while it approved the chosen method – expressed its impressions that a collective approach could have been more appropriate taking into account the huge number of the victims, the length of the time necessary to evaluate the content of the applications and the differences between the calculated harms and the adjudged reparations.[614]

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may be challenged on appeal based on the Trial Chamber's consideration of the factors laid out in rule 98 (3) of the Rules of Procedure and Evidence." Lubanga, reparation, appeal, 2015, § 7, p. 8.

613 "Only victims within the meaning of rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund, who suffered harm as a result of the crimes for which Mr Lubanga was found guilty, are eligible to claim reparations against Mr Lubanga. Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible." Lubanga, reparation, appeal, 2015, § 8, p. 8.

614 "1. The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations. However, the Appeals Chamber considers that the Trial Chamber's approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.

2. Rather than attempting to determine the "sum-total" of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.

## 5. USE OF PRESUMPTIONS, SAMPLES AND APPROXIMATIONS TO HAVE AN ADEQUATE VIEW OF THE NUMBER OF VICTIMS AND THE COSTS OF THE REPARATION OF THEIR HARMS

When preparing the reparation order based on the test of the *balance of probabilities* formulated in similar terms in the decisions of the Lubanga[615], Katanga[616],

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3. There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings."
International Criminal Court, 2018h, § 1-3, pp. 4-6. (in the following: Katanga, reparation, appeal, 2018).

615 "253. Given the Article 74 stage of the trial has concluded, the standard of "a balance of probabilities" is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person." Lubanga, reparation, principles, 2012, § 253, p. 84.
"65. In relation to the standard of proof, the standard of "a balance of probabilities" shall apply." International Criminal Court, 2015i, § 65, p. 15. (In the following: Lubanga, amended order, 2015).
"43. Lastly, it is to be noted that the standard of proof as to whether a victim qualifies for an award is a balance of probabilities."
"66. In the case at bar, the crimes of which Mr Lubanga was convicted entail as a precondition to qualify for reparations as a victim – direct or indirect – that the enlistment, conscription or active participation in hostilities of a child under the age of 15 years in the UPC/FLPC's armed forces in a non-international armed conflict between 1 September 2002 and 13 August 2003 ("child-soldier status") be established on a balance of probabilities.(...)" Lubanga reparation, 2017, §§ 43, 66, pp. 23, 34.

616 As stated in the Katanga's victims' reparation order:
"50. Having regard to the foregoing, the Chamber will avail itself of the "balance of probabilities" standard. Thus the Chamber must be satisfied that the facts alleged by an Applicant in claiming reparations are established on a balance of probabilities. That standard means that the Applicant must show

Ntaganda[617], Al Mahdi[618] and Ongwen[619] reparation procedures where the applicable standard of causality is the so called '*but/for*' rule according to the term inherited from the common law (in the continental law: *sine qua non*), in *re* Lubanga[620],

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that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which Mr Katanga was convicted." Katanga reparation order 2017, § 50, p. 26.

617 "136. The Chamber notes that reparation proceedings require a less exacting standard of proof than trial proceedings. In line with the previous jurisprudence, the Chamber adopted the 'balance of probabilities' test as the appropriate standard of proof in reparation proceedings."
International Criminal Court, 2021y, §136, p. 50. (In the followings: Ntaganda, reparation order (2021).
"35. In addition, the Chamber indicated that reparations proceedings require a less exacting standard of proof than trial proceedings and, in line with previous jurisprudence, it adopted the 'balance of probabilities' test as the appropriate standard of proof in reparations proceedings." International Criminal Court, 2023p, § 35, p. 16. (In the followings: Ntaganda reparation addendum (2nd order) 2023).

618 "44. (...) The standard of proof to be met in establishing this causal link is that of a balance of probabilities." Al Mahdi, reparation, 2017, § 44, p. 19.

619 "(...), the Chamber notes that it has indeed, in this Order, taken into consideration the victims' suffering on a community level. In this regard, the Chamber has opted to assess whether community harm has been established on a balance of probabilities based on the evidence in the case file as opposed to introducing it as a larger reparations principle." Ongwen, reparation, 2024, § 66, p. 43 (See also e.g. §§ 66, 144, 146, 159 etc. on pp. 43, 82, 84, 89.

620 "250. In reaching this conclusion as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect the divergent interests and rights of the victims and the convicted person. Balancing those competing factors, at a minimum the Court must be satisfied that there exists a "but/for" relationship between the crime and the harm and, moreover, the crimes for which Mr Lubanga was convicted were the "proximate cause" of the harm for which reparations are sought." Lubanga, reparation, principles, 2012, § 250, p. 83.
"59. The standard of causation is a "but/for" relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr Lubanga was convicted were the "proximate cause" of the harm for which reparations are sought." Lubanga, amended order, 2015, § 59, p. 14.
"42. The standard of causation requires that the crimes of which the person was convicted were the "proximate cause" of the harm for which reparations are sought, and consists of a but-for relationship between the harm and the crime."

Katanga[621], Ntaganda[622], Al Mahdi[623] and Ongwen[624], the use of presumptions and the establishment of a statistical sample helped judges pass a decision on reparation.

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"186. The Appeals Chamber held that the standard of causation is a but-for relationship between the harm and the crime. There is a further requirement that the crimes of which the person was convicted must be the "proximate cause" of the harm for which reparations are sought. The Appeals Chamber made plain, moreover, that the causal nexus between the crime and the harm must be determined in view of the characteristics of the case under consideration." Lubanga reparation, 2017, §§ 42, 186, p3. 23, 69.

621 "162. The Appeals Chamber held that the standard of causation is a but-for relationship between the harm and the crime. There is a further requirement that the crimes of which the person was convicted were the "proximate cause" of the harm for which reparations are sought." Katanga reparation order 2017, § 162, p. 62.

622 "132. The Chamber adopts the 'but/for' standard of causation as to the relationship between the crimes and the harm. Moreover, it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought, as established in the Lubanga case.
133 The Chamber underlines that the 'proximate cause' is one that is legally sufficient to result in liability, assessing, inter alia, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm." Ntaganda, reparation order, 2021, §§ 132, 133, p. 49.
"36. In relation to the causal link, the Chamber adopted the 'but/for' standard of causation as to the relationship between the crimes and the harm. Moreover, the Chamber indicated that it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought. The Chamber underlined that the 'proximate cause' is one that is legally sufficient to result in liability, assessing, inter alia, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm." Ntaganda reparation addendum (2nd order) 2023 § 36, p. 17.

623 "44. It must be established that the crime committed by Mr Al Mahdi is the actual ('but/for') and 'proximate cause of the harm for which reparation is sought. 'Proximate cause' is a cause that is legally sufficient to result in liability, and in assessing proximate cause, the Chamber will consider, inter alia, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm." Al Mahdi, reparation, 2017, § 44, pp. 18-19.

624 "In relation to the causal link, the Chamber recalls that it adopted the 'but/for' standard of causation as to the relationship between the crimes and the harm. Moreover, the Chamber indicated that it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought. The Chamber underlines that the 'proximate cause' is one that is legally sufficient to result in liability, assessing, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm." Ongwen, reparation, 2024, § 434, p. 205. See also §§ 193, 205, pp. 104, 108.

### 5.1. The use of presumptions

Presumptions were used in Katanga's victims' reparation for lost property (i.e. animal husbandry, average household equipment and dwelling) and for suffered psychological harm related to the attack. In Lubanga's victims' reparation, the presumption pointed out at the psychological harm linked with the child-soldiering past (or in case of indirect victims, the loss of their children killed or disappeared) and in Ntaganda's victims' reparation, the presumption was connected with child-soldering, rape and sexual slavery concerning direct as well as indirect victims. (The issue did not emerge however in Al Mahdi's victims' reparation.)

The Appeals Chamber - albeit with caution - recognized the procedural advantages of presumptions.

In the judgment on the reparations for Katanga's victims "[t]he Appeals Chamber recalls that, in reparations proceedings, a standard "less exacting" than that for trial applies. This is, in part, due to the difficulties victims may face in obtaining evidence in support of their claims. The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber's discretion in determining "what is 'sufficient' for purposes of an applicant meeting the burden of proof".[625]

It emphasized that "[r]esort to factual presumptions in reparations proceedings is within a trial chamber's discretion. However, this discretion is not unlimited, and a trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions."[626]

In the judgment on the appeal in Lubanga's victims' reparation case, the Appeals Chamber pointed out that the proper use of

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625 Katanga Appeals Chamber Judgment on Reparations, § 75 (emphasis added), (footnotes omitted).

626 Katanga, reparation, appeal, 2018 § 4, p. 5.
International Criminal Court, 2018h.

presumptions should go hand in hand with procedural foreseeability: "the trial chamber must give notice to the parties of the manner in which it intends to conduct the reparations proceedings before it, especially where it does not intend to make individual determinations with respect to each victim who has filed a request. In this regard, a trial chamber must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information, - e.g. does it intend to assess each request individually? The Trial Chamber must also ensure that the parties are on notice as to the standard of proof that will be applied in the proceedings so that they are aware of the manner in which information will be assessed."[627]

Following the 'fairness approach', the Appeals Chamber emphasized in the judgment on the appeal in Ntaganda's victims' reparation case that the documentary 'basis' of the used presumptions should be indicated as clearly as possible[628] and the defence should enjoy a right to contest the presumptions that are of *presumptio iuris* nature.

"Considering that presumptions of fact are rebuttable, shifting the burden of proof to those who wish to challenge their applicability, it is expected that the Trial Chamber will devise an avenue whereby the Defence is provided with a reasonable opportunity to rebut presumptions in proceedings before the Trial Chamber, for example, by having access to at least a minimum amount of information contained in the applications for reparations, so as to be able to make specific submissions and provide evidence to rebut presumptions that may not be

627 International Criminal Court, 2019g, § 90, p. 37. (In the followings: Lubanga, reparation, appeal (2019)).

628 "Although it would have been preferable for the Trial Chamber to have referred to those submissions expressly, the Appeals Chamber notes that the Trial Chamber duly referred to the information on which it relied to make the seven presumptions, i.e.: the Conviction Judgment, the Sentencing Judgment, the expert reports, submissions from the TFV and Victims Group 2, and jurisprudence from the Appeals Chamber as well as decisions from other chambers." International Criminal Court, 2022q, § 688, pp. 286-287. (In the followings: Ntaganda Appeals Chamber Judgement on Reparations (2022)).

applicable to such applications. The Appeals Chamber observes that in granting the Defence access to the victims' applications, the necessary redactions shall be made to protect the victims' safety, physical and psychological wellbeing, dignity and privacy, pursuant to article 68 of the Statute."[629]

The order adopted on Ongwen's victims' reparation also contains several references on presumptions. As a general rule, the order stated that "[a]s stressed by the Appeals Chamber 'the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case'. In light of the circumstances of the present case, the Chamber finds appropriate to resort to factual presumptions in order to consider certain harms to be established to the requisite standard of proof, once a person has proven, on a balance of probabilities, to be a victim of the crimes that form part of the conviction."[630]

However, even if the parties and participants of this reparation procedure relied extensively upon many presumptions considered by them as flowing from or being compatible with the jurisprudence of the ICC, this reparation order also reflects due caution vis-à-vis the exaggerated use of presumptions. This cautious approach manifested itself as to granting victim status solely upon the persons' pure presence on the list of inhabitants of the attacked villages[631] and also as

629 Ntaganda Appeals Chamber Judgement on Reparations (2022) § 68, p. 287.

630 Ongwen, reparation, 2024, § 519, p. 231.

631 "Consequently, the Chamber considers that it shall not be necessary to scrutinise whether individuals who were present in or were residents of the four IDP camps at the time of the attacks on said camps are indeed victims of the crimes of attack against the civil population as such and persecution through the underlying act of attack against the civilian population as such. However, the Chamber notes that, in order to benefit from this presumption, said individuals must still establish, on a balance of probabilities, that they were either a resident of or physically present in one of the camps at the time of the attacks. (...) Based on the findings above, the Chamber hereby reiterates that it rejects the adoption of all of the presumptions suggested by the parties and participants, with the exception that all individuals who can establish, on a balance of probabilities, that they were present in or who were camp residents at the time of the attacks on the Pajule, Odek, Lukodi, and Abok IDP camps, shall be presumed to be victims of the crimes of an attack against the civil population as such and persecution, through the underlying act of attack

to a *quasi* automatic recognition of the so called transgenerational harms.[632]

Examining the issue of physical, moral and material harms in the context of the different crimes for which Ongwen was condemned, the presumption of their existence was subordinated to the establishment – on a balance of probabilities – of the individuals' victim quality. A voluminous paragraph shows the different types of harm to be presumed according to the different crimes and in agreement with the direct or indirect victim capacity.[633]

### 5.2. The use of a 'sample'

The judges' work is considerably eased when instead of waiting for the arrival of all the necessary data of the 'universe of the potential victims[634], they analyse a good but representative sample of victims in order to get sufficiently detailed information about the victims according to their age, sex as well as about the different types of harms to be repaired. This was done first in the Lubanga reparation order and then – upon the instruction of the Appeals Chamber – in the Ntaganda reparation order as well.

One of the reasons of the long time that the identification of potential victims takes is the insecurity on the field. The recurrent hostilities in Ituri with the intervention of new militias as well as the impact of Ebola rendered the work of the VPRS (*Victims Participation and Reparations Section)* much more difficult as well as that of the Trust Fund but the main difficulty resided in the mistrust of former child-soldiers: even if they were keen to get reparations, they were at the same time afraid of being harassed or even

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against the civilian population as such." Ongwen, reparation, 2024, §§ 164, 165, p. 91.

632 "The Chamber, however, notes that it does not have sufficient information to reach a conclusion as to presumptions of moral harm for all victims in the case or for a presumption of transgenerational harm, as proposed by the CLRV and the Registry." Ongwen, reparation, 2024, § 555, p. 244.

633 Ongwen, reparation, 2024, § 556, pp. 245-246.

634 International Criminal Court, 2022ad, §§ 23-27, 33-34, pp. 11-12, 16.; Ntaganda reparation addendum (2nd order) 2023, §§ 9, 10, 28, pp. 7, 14, 15.

retaliated on behalf of Lubanga's or Bosco Ntaganda's sympathizers. Taking into account that the Ntaganda trial was still ongoing during the Lubanga reparation procedure, a good number of former UPC/FPLC child-soldiers were more than reluctant to complete a dossier for reparation. Neither did they trust confidentiality rules concerning victims' protection within the ICC. Their fear certainly did not diminish when they learned that in the Lubanga reparation procedure, the defence was insisting on contradictory hearing and on the necessity of having access to the full record without any redaction. Although these submissions were refused, the number of the collected application-dossiers, which was only about twenty in 2015, was growing very slowly.

However, due to an on the field assistance given by the VPRS to the victims representatives and the Trust Fund, the given trial chamber had already 473 applications in 2017: the eligibility screening made by the judges pointed out that 425 satisfy *ratione personae*, *ratione temporis* and *ratione materiae* the necessary criteria. (Those which were rejected were either baseless applications filled in by people out of the scope of the charges or even without a real child-soldier past within the UPC/FPLC. The lack of substantiating evidence at least in the form of truthful knowledge of the commanders' names, toponyms related with formation or combat action was also a reason for refusal.)

The 425 remaining applications were analysed and the repartition of direct and indirect victims, their gender, their suffered harm and the means of their reparation (i.e. elementary or professional schooling, medical or psychological services) could have been deduced. The purpose of the establishment and the analysis of the sample was to give clear methodological instructions how to deal with applications to be collected in the future.[635]

In the judgment on the appeal in Lubanga's victims' reparation case, the Appeals Chamber apparently did not feel it necessary to express a standpoint on the sample and rather it considered it only

635 Lubanga reparation order 2017, §§ 293, 296, pp. 106-108.

in general terms as one of the technics the use of which belongs to the judges' discretionary power.[636]

However, three years later, when the Appeals Chamber found it unclear how another trial chamber calculated Ntaganda's financial liability, it pointed out that the lack of a sample contributed to the lacunas in the explanation of the calculation of the imposed financial amount.[637]

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636 "138. The Appeals Chamber notes that the relevant legal provisions – article 75(1) of the Statute, rules 94-98 of the Rules (...) and the Regulations of the TFV – do not stipulate who should assess eligibility in cases where collective reparations are awarded nor how exactly this should be done. Furthermore, as discussed earlier in this judgment, in the type of reparations proceedings facing the Trial Chamber in the present case, the Appeals Chamber has found that trial chambers need not, in all cases, individually consider requests for reparations which have been filed. It does not, however, follow from this that a trial chamber is precluded from doing so." Lubanga, reparation, appeal (2019) § 138, p. 55.
"142. First, as indicated above, the Appeals Chamber did not prohibit the Trial Chamber from assessing eligibility. Second, the Appeals Chamber notes that trial chambers have a large degree of discretion in deciding how to conduct reparations proceedings. In this case, the Trial Chamber decided that it needed to receive and assess victims' dossiers in order to reach a decision as to Mr Lubanga's overall monetary liability. This decision properly fell within the Trial Chamber's discretion to conduct the proceedings before it, based on the circumstances of the case." Lubanga, reparation, appeal (2019) §§ 138, 142, pp. 55, 56.

637 "Turning to the present case, the Appeals Chamber recalls that it has analysed above the manner in which the Trial Chamber determined the number of potentially eligible victims for reparations and the amount of 30 million USD that it awarded; and that it has found errors in respect thereof. The Appeals Chamber is of the view that, in the instant case, the Trial Chamber ought to have examined at least a sample of applications from victims prior to arriving at its determinations of those matters, so as to have been able to base the award on a stronger evidential basis." Ntaganda Appeals Chamber Judgement on Reparations § 342, p. 143.
"More generally, and as mentioned above, ruling on a sample of applications may provide potentially crucial information in relation to the number of victims who wish to receive reparations, which, in turn, may form a sound basis for the calculation of the award (...) Indeed, had the Trial Chamber ruled on a sample of applications, it would have obtained specific information about the types of harm which actual victims claiming reparations had suffered, which would also have been relevant to the costs to repair those harms and thus to the amount of the award. In sum, in an order in which key parameters are either undetermined

In the Key findings of the judgment, partially reversing the order and instructing the trial chamber to prepare a new additional and more reasoned order, the Appeals Chamber stipulated that "[t]here may be cases in which there is, or there appears to be, a high number of potential beneficiaries and it is thus not desirable to set out findings in respect of all applications. The Appeals Chamber also notes that there may be circumstances in which, despite concrete efforts, it will not be possible to receive applications from all potential beneficiaries within a given period of time, but that they are likely to come forward in the future. In these circumstances, a trial chamber may elect instead to rule only on a sample of applications for reparations and then proceed to estimate how many more potential beneficiaries will come forward in the future. In such cases, the information contained in the sample of applications for reparations may be essential to a determination of the types of harm and the cost to repair the harm with respect to all beneficiaries, including those who come forward only at the implementation stage of the proceedings. Ruling on applications from a sample, which must be a representative one, may allow a trial chamber to extrapolate the makeup of the entire group of beneficiaries, according to the types of harm suffered by victims from each sub-group. This, in turn, is relevant to the ultimate determination of the amount of the award."[638]

Upon the instruction of the trial chamber of a partly new composition, the registry established a sample on the basis of the submitted applications. This sample was "a randomly selected group from the total universe of victims, amounting to 5% of the victims of the attacks and a 5% of the victims of crimes against child soldiers."[639] The eligibility assessment and in case of a positive decision the analysis of the harms from the point of view of the adequate type of reparation were

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or insufficiently explained, an analysis of the applications would have produced a sounder evidential basis for the conclusions that were necessary." Ntaganda Appeals Chamber Judgement on Reparations § 343, p. 144.

638 Ntaganda Appeals Chamber Judgement on Reparations § 10, p. 14. See also: § 341, pp. 142-143.

639 International Criminal Court, 2023q, § 28, p. 14. (In the following: Ntaganda reparation addendum (2nd order) 2023).

carried out on the basis of this sample and the parties could express their views about its content. Finally, 132 out of 171 applicants were qualified eligible. Those who were not retained had the right to supplement their dossiers and ask for a review.[640]

In Ongwen's victims' reparation procedure, a similar 5 % sample was constituted by a random selection from the already submitted victims' applications.[641] The examination of these 205 applications – where the Defence accepted 178 persons' victim quality without contestation[642] - showed once again that the victims' eligibility can be substantiated in a convincing manner[643] and the statistical repartition of harms[644] (moral harms: 95 %[645]; physical harms: 76 - 82 – 88 -100 % - according to the different crimes[646]; material harms 76 – 100 % - according to the different crimes[647]) can be well seen.[648] This latter is especially important when calculating the approximative costs of reparation.

### 5.3. The 'approximation' of the number of the eligible victims

It is clear that the total amount of the financial liability cannot be calculated without knowing the number of beneficiaries.

In the procedure of Lubanga's victims' reparation, the trial chamber had to cope with several difficulties: not only did the submission and the collection of the applications go very slowly, the fact that the Democratic Republic of Congo did not possess a full list of the child-soldiers whose demobilization was done with the help of the UNICEF and the World Bank also hindered the procedure. Another major challenge was that the information and figures communicated by United Nations' organs and missions as well

640 See Ntaganda reparation addendum (2nd order) 2023, §§ 144-148, pp. 57-58.
641 Ongwen, reparation, 2024, § 427, p. 203.
642 Ongwen, reparation, 2024, § 431, p. 204.
643 Ongwen, reparation, 2024, §§ 490-494, pp. 222-224.
644 Ongwen, reparation, 2024, §§ 495-502, pp. 224-226.
645 Ongwen, reparation, 2024, § 523, p. 232.
646 Ongwen, reparation, 2024, §§ 527- 529, pp. 234-235.
647 Ongwen, reparation, 2024, § 530, pp. 235-236.
648 Ongwen, reparation, 2024, §§ 508-510, pp. 227-228.

as the NGO-s often concerned child-soldiers in the terms of the UN conventions (i.e. a child under 18 years) and only rarely according to the Rome Statute rule (i.e. a child under 15 years). The DDR (Disarmament, Demobilization and Reintegration) programs managed jointly by the DRC and the United Nations did not provide a simple comprehensive list with data concerning the children's appurtenance to this or that militia. The certificate of demobilization – often lost by the children – did not contain any reference to the given ethnic militia in order to preserve the child form ethnic revenge from the other side.

Under these conditions, the trial chamber used the evidentiary pieces of information and documents submitted in the criminal phase of the procedure. They were, in fact, mostly free access UN documents (UNICEF, IBRD, MONUC etc) on child soldiers and their demobilization as well as an interview made with Lubanga speaking about the number of his warriors along with two lists received from the DRC government containing the results of only a short DDR-period. The two lists were overlapping and militia-specific; moreover, one of them contained not only names and the militia but also the children's age.

These documents made it possible to calculate certain proportions. The judges concluded using the three possible methods[649] that irrespectively of the starting point, namely whether it was (A) the

649 The *'A' method*: (when the starting point A is the total number of the UPC/FPLC warriors under Lubanga's authority: A x proportion of child-soldiers under 18 years x proportion of child-soldiers under 15 years x proportion of mortality within child-soldiers = the number of Lubanga's child-soldiers according to the Rome Statue.
The *'B' method* : (when the starting point B is the total number of the UPC/FPLC child-soldiers reported by different UN missions, according to the UN standard): B x proportion of child-soldiers under 15 years x proportion of mortality within child-soldiers = the number of Lubanga's child-soldiers according to the Rome Statue.
The *'C' method* : (when the starting point C is the total number of demobilized child-soldiers in Ituri): C x Hema ethnic proportion x proportion of child-soldiers under 15 years x proportion of self-demobilized children x proportion of mortality within child-soldiers = the number of Lubanga's child-soldiers according to the Rome Statue.

number of Lubanga's soldiers, or (B) the number of child-soldiers reported by the UN-missions or (C) the number of all the children demobilized in Ituri province, the estimated final number was very close to each other, i.e. around 3000, the lowest being 2451, the highest 5938. The documents were listed and the proportions and their sources and reliability were explained in detail in the order and in its annex III.[650]

Having presented the method giving the lowest number (2451), the order concluded that "the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted far exceeds the 425 persons who have established that they are victims for the purposes of reparations and that there are hundreds and possibly thousands more victims."[651]

In the judgment of Lubanga's victims' reparation, the Appeals Chamber rejected the arguments of the defence, and it pointed out that the trial chamber had answered the concerns of the defence about the reliability of these 'additional documents'[652] and that of

650 See the explanation of the proportions: Hema ethnic proportion in Ituri: 20 %; proportion of child-soldiers under 18 years according to the UN: 40 %; proportion of child-soldiers under 15 years according to the DRC documents: 71 %; proportion of mortality among child-soldiers: 15-23 %.
In detail with sources: Lubanga, reparation, 2017, §§ 225-228, pp. 83-84.

651 Lubanga, reparation, 2017, §§ 212, 231, 244, pp. 78, 85, 92.

652 "226. (...) The Appeals Chamber, however, notes that the Trial Chamber's approach was to refer to the Additional Documents 'by way of illustration'. The Trial Chamber also pointed to the consistency of these documents regarding 'the widespread use of child soldiers in Ituri'. The Appeals Chamber also notes that the Trial Chamber applied coefficients to account for the scope of the reports, which in some cases was broader than that of the charges in the present case. For instance, the Trial Chamber applied a coefficient to account for the proportion of the ethnic Hema group and for the proportion of children under the age of 15 years. The Appeals Chamber considers that the Trial Chamber did address the concerns about the reliability of the Additional Documents." Lubanga, reparation, appeal (2019) § 226, p. 90.

the lists received from the DRC government[653] as well as the use of 'coefficients[654].

It is worth mentioning that in the meanwhile, the Trust Fund for Victims had managed the assessment of the collected applications, and it reported in September 2023 that 2471 victims were identified and approved of, a number considered as final.[655]

The issue of approximations also emerged in the procedure of Ntaganda's victims' reparation. The remarks of the Appeals Chamber made in the context of the sample about the need "to extrapolate

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653 "232. The Trial Chamber also found that the lists cover a 'significant subset of the persons concerned (15% of the 3,000 victims estimated by the TFV)', and that the particulars of children extracted from the DRC's databases were 'precisely recorded' in the lists. The Trial Chamber then concluded that the lists 'can be considered to have representative value'. The Appeals Chamber therefore finds that the Trial Chamber did consider Mr Lubanga's submissions on the reliability of the documents in question."
"233. Furthermore, in the Impugned Decision the Trial Chamber relied on the lists to conclude that 'these two lists are a first indication that the total number of victims affected by the crimes of which Mr Lubanga was convicted is far greater than the number of persons in the sample who have established that they are victims for the purposes of reparations'. As discussed above, the Trial Chamber relied on a number of other reports, on the findings from trial, and on the parties' submissions to reach its finding as to Mr Lubanga's monetary liability. Therefore, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on the demobilisation lists for the limited purpose of showing that the total number of victims affected by Mr Lubanga's crimes was 'far greater' than the 425 in the sample." Lubanga, reparation, appeal (2019) §§ 232, 233, p. 93.

654 "228. The Appeals Chamber recalls that the Trial Chamber's approach was to account for certain potential inaccuracies of the Additional Documents by means of coefficients. (...) Therefore, while not discounting Mr Lubanga's concerns about the reliability of the Additional Documents, the Appeals Chamber finds that, given the Trial Chamber's use of coefficients and the limited significance of the estimate based on these documents, it was not unreasonable for the Trial Chamber to rely on them to conclude that the 425 victims are only a sample of the potentially eligible victims and that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted." Lubanga, reparation, appeal (2019) § 228, p. 91.

655 International Criminal Court, 2023s, § 11, p. 5.

the makeup of the entire group of beneficiaries"[656] have already been referred to above.

During the preparation of the reparation order, the judges had to take into account that Ntaganda's victims can be divided into two groups, namely (1) 'victims of the attack', and (2) UPC/FPLC child-soldiers. Concerning this second group, Ntaganda was liable *in solidum* with Lubanga for the crime of child-soldering as such so the number of victims did not need not be recalculated as it was the same as certified by the Trust Fund during the execution of the order concerning Lubanga's victims' reparation.[657] There was however a sub-group called 'victims of crimes committed against child soldiers' meaning mostly sexual and gender based crimes against girls within the militia. This was the 3rd group (in fact a sub-group) among Ntaganda's victims and according to the sample, this would concern cca. 18,2 % of the child-soldiers.[658]

As a result, the real issue was how to evaluate the number of the 'victims of the attacks'. The lack of a number calculated or approved by the trial chamber was one of the reasons why the Appeals Chamber instructed the trial judges to revisit the case as the original order only contained the rather different estimations submitted by the parties and the appointed experts. These estimations oscillated between 1000 and 100 000, and the judges concluded that "thousands of victims may be eligible for reparations in the present case[659]" and put that the precise number could be stated only when reparations are accomplished.[660]

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656 Ntaganda Appeals Chamber Judgement on Reparations § 10, p. 14. See also: § 341, p. 143.

657 Ntaganda reparation addendum (2nd order) 2023 §§ 291, p. 125.

658 Ntaganda reparation addendum (2nd order) 2023 §§ 296, p. 127.

659 Ntaganda, reparation order (2021)), § 246, p. 92.

660 "However, the Chamber is cognisant of the impossibility to predict in advance how many victims may ultimately come forward to benefit from collective reparations with individualised components during the implementation stage, particularly considering the widespread, systematic, and large-scale nature of the crimes for which Mr Ntaganda was convicted." Ntaganda, reparation order (2021), § 246, p. 92.

During the preparation of the *addendum* to the reparation order, the trial chamber reviewed all the previous submissions in the matter and asked new ones with deeper explanations about the estimated numbers. Some of the parties revisited their positions and submitted new numbers – very different from their previous ones – but the argumentation was always based on making a 'guess' on the basis of the information collected in the field. The difficulties behind guesses were related to uncertainties as to *i.* the previous and the current number of the population of the localities targeted by the attacks, *ii.* the number of those who left the localities in the period of charges and of those who left it earlier or at a later moment, *iii.* the number of the people who returned and *iv.* the demographic impact of all the above on the current local population.

Finally, the trial chamber decided to accept 'approximately 7500", i.e. the number submitted by the Trust Fund with the reasoning[661] that

661 "316. In assessing the reliability of the projections made by the TFV, the Chamber also considered the Registry's work during the preliminary mapping exercise and the estimations provided by the Appointed Experts. As to the Registry's estimations, the Chamber notes that the results of the consultations conducted during the preliminary mapping led the Registry to consistently indicate that 'at least' approximately 1,100 individuals would qualify as new potential victims of the attacks (in addition to the eligible participating victims of the attacks, which the Registry estimated in approximately 1,176) and that it was not to be anticipated that the final number would be exponentially higher. Similarly, the Chamber notes that the Appointed Experts estimated that, at least, 3,500 direct victims of the attacks were potentially eligible for reparations, while the number of indirect victims could not be ascertained by them. Having also assessed the parties submissions related to these estimates, the Chamber is satisfied that both the Registry in 2020 and the Appointed Experts held consultations with different stakeholders in order to inform their views. As such, the Chamber is satisfied that both estimations, in the Registry's preliminary mapping exercise and by the Appointed Experts, as reflected in their reports, lend sufficient basis for the Chamber to rely on these estimates in order to conclude that, at the very least, a minimum of 3,500 direct victims of the attacks will qualify as potential beneficiaries of reparations in the present case.

317. Considering that the estimate above is indeed a minimum, the Chamber has also taken into account the Registry's recent submission that the identification and tracking of potential beneficiaries during the preliminary mapping exercise was particularly challenging, due to the population displacements, and that more than 70% of the pre-conflict population has still not returned to

they did not include all the internally displaced persons (IDP-s) who left their villages in order to avoid similar attacks. It is to be emphasized that even if a person is not recognized eligible to reparation as victim of the case, this does not mean that the same person cannot benefit from the services granted under 'assistance mandate' as victim of the situation.

Having in hand the number, i.e. 7500 persons, and the data of the sample concerning the harms as well as the costs of different medical, psychological, schooling services provided by the Trust Fund following the experiences acquired during Lubanga's victims' reparation, the judges could fix Ntaganda's financial liability at 31 million USD[662], more or less the same amount that the previous chamber calculated in 2021.[663]

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their localities of origin. The Chamber has assessed this submission in order to consider the different possible estimates and calculations. The Chamber understands the current argument from the Registry to imply that the estimations provided as a result of the preliminary mapping exercise would have corresponded to approximately 30% of the total number of potential victims of the attacks, and thus, approximately a 70% extra needs to be added in order to obtain the final number of potential victims of the attacks. this lead the Chamber to consider the number of potential new victims of the attacks advanced by the Registry within the context of the preliminary mapping (1,100) which added to the number of participating victims of the attacks that the Registry estimated as remaining within the scope of the conviction (1,176), provides the result that the Registry now appears to indicate that would have corresponded to approximately 30% of the potential victims of the attacks: 2,276 individuals. From that number the Chamber can now calculate that the 70% purportedly remaining would amount to approximately 5,311 individuals, with the total number of potential direct and indirect victims of the attacks, following this reasoning, amounting to 7,587 individuals." Ntaganda reparation addendum (2nd order) 2023 §§ 316-317, pp. 137-138.

662 "Overlapping Lubanga/Ntaganda victims: 10 000 000 USD. Ntaganda-only child-soldiers/SGBV victims: 2096 320 USD. Psychological harm (victims of the attack): 5 032 868 USD. Physical harm (victims of the attack) 11 189 765 USD. Sayo health center 130 000 USD. Total: 31 229 905 USD." Ntaganda reparation addendum (2nd order) 2023, § 358 p. 153.

663 After having enumerated the costs of services estimated by the Trust Fund and the appointed experts and evoking once again the divergent views on the number of potentially eligible victims, the order stated: "Taking all the above considerations into account, resolving uncertainties in favour of the convicted person and taking a conservative approach, the Chamber sets the

In the Ongwen's victims' reparation procedure, the Chamber approximated the number of the victims of the attacks of the four villages, namely Abok, Lukodi, Odek, Pajule to 46 898[664] on the basis of the submitted materials reflecting the number of the inhabitants at the time of the charges.

Within the cercle of the 'victims of thematic crimes', the number of child-soldiers' was estimated at 3 096[665].

In the approximation, the Chamber profited deeply from the so-called Berkeley Report,[666] which was submitted by the Registry[667] and was based on detailed and age specific data communicated by the different Disarmement and Demobilization Centers of Uganda. The Chamber took into consideration that the time frame within the report was larger than the period of charges and that four LRA brigades were simultaneously active at that time. Consequently, the rough number of 22 000 was diminished to *i.* 69,7 % , representing the *ratio* of the children under 15, *ii.* then to 19,23% corresponding to the respective time, *iii.* and finally to its 25 %, in order to show their approximative number in Ongwen's Sinia brigade.[668]

As the Chamber pointed out that the 69,7 % *ratio* of the children under 15 (i.e. the age limit of child-solders according to the Rome Statute) with the cercle of all the warriors under 18 seems to be *quasi*-identical to the number in the Lubanga case (71 %), although calculated using another method.[669]

The approximated number of the SGBC victims was determined in a similar manner, starting with the Berkeley Report presenting the number of cases related during the interviews in the DDR centers and the ratios 19, 23 % (time factor) and 25 % ('one brigade from the four') were observed. In this way, from the rough number of 2 255 women

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total reparations award for which Mr Ntaganda is liable at USD 30,000,000 (thirty million dollars)." Ntaganda, reparation order (2021), § 247, p. 93.

664 Ongwen, reparation, 2024, § 725, p. 314.

665 Ongwen, reparation, 2024, § 735, p. 320.

666 Pham, Vinck, Stover, 2007.

667 International Criminal Court, 2021aa

668 Ongwen, reparation, 2024, §§ 732-735, pp. 318-320.

669 Ongwen, reparation, 2024, § 732, p. 318.

over 19, 'only' 455 could be linked to the Sinia brigade.[670] However, as it was mentioned in the Ongwen trial judgment, abducted girls between 15-19 and even between 12-15 also complained of sexual abuse, the Chamber took into account the number of cases listened or referred to during the trial, and with this in mind, it concluded that cca 1000 women can be considered as victims of the SGB crimes for which Ongwen was also condemned.[671]

Totalizing the different groups of victims, and taking into account a partial overlapping of certain groups of victims (i.e. the so-called 'dual victims'), the reparation order gave the approximative number of 49 772 as potentially eligible victims[672] and established Mr Ongwen's financial liability as follows: on the basis of the estimations of the Trust Fund, the different medical, psychological and educational elements of the reparation services would cost cca 15 million euros[673] and a symbolic 750 euro award[674] for the 49 772 victims would mean 37 329 000 euros.[675] Symbolic memorials, prayers, reconciliation ceremonies should be organized for 100 000 euros. All in all, Mr Ongwen's financial liability - *in solidum*[676] with other perpetrators – amounts to 52 429 000 euros[677].

Taking into account Mr Ongwen's indigency, this is the Trust Fund for Victims that should pass a decision about the use of its 'other resources'. The order pointed out that "the Chamber acknowledges that, in light of the convicted person's indigency, the payment of the symbolic award to victims will be subject to a corresponding decision of the TFV's Board of Directors and to the TFV's ability to complement the reparations award."[678]

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670 Ongwen, reparation, 2024, §§ 736-738, pp. 320-321.
671 Ongwen, reparation, 2024, §§ 739-741, pp. 322-323.
672 Ongwen, reparation, 2024, § 748, p. 327.
673 Ongwen, reparation, 2024, § 788, p. 345.
674 For the calculation of the 750 euro award, comparing it with the 250 USD in the Katanga reparation order, the GDP differences between DRC and Uganda and the elapsed time since the Katanga order, see: Ongwen, reparation, 2024, §§ 621-631, pp. 267- 361.
675 Ongwen, reparation, 2024, § 790, pp. 345-346.
676 Ongwen, reparation, 2024, § 667, p. 283.
677 Ongwen, reparation, 2024, § 794-795, pp. 347.
678 Ongwen, reparation, 2024, § 633, p. 222.

## 6. THE ISSUE OF THE TRANSGENERATIONAL HARMS

The question of transgenerational harms emerged in the Katanga[679], Ntaganda[680] and Ongwen[681] cases essentially in the context of raped women's children's eligibility to reparation. There are two leading schools (i.e. the epigenetic school and the socio-behavioural school), which elaborated the theory of transgenerational harms discovered after World War Two mainly among Holocaust survivors' descendants who all showed certain typical symptoms, generally of psychological nature. Their observations still apply for victims of present-day crimes against humanity.

As transgenerational harms concern first and foremost children - even if the symptoms can manifest themselves later in life as well – I decided to tackle the jurisprudential presence of this question in the chapter about *Children in the practice of the International Criminal Court* and I advise the reader to consult its subpoint 3.2. .

Here I limit myself to state that the jurisprudential perception of transgenerational harms and the importance of their reparation are *in abstracto* recognized by judges. However, the symptoms cannot be presumed but should be established in order for a victim to be eligible to reparation under this legal title. However, transgenerational harm cannot be limited to psychological harm, it can also emerge as a non-mental illness or deficiency. As the order about Ongwen's victims' reparation stated: "The Chamber, however, notes that it does not have sufficient information to reach a conclusion as to presumptions of moral harm for all victims in the case or for a presumption of transgenerational harm, as proposed by the CLRV and the Registry."[682]

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679 International Criminal Court, 2018h, § 260, pp. 110-111.; International Criminal Court, 2019l, pp. 8-10, §§ 9-14.

680 Ntaganda Appeals Chamber Judgement on Reparations, §§ 17, 484, 492, 494, 495, pp. 15-16, 197, 200-202;
Addendum, Ntaganda victims' reparation, 2023, §§ 183-184, p. 78.

681 Ongwen, reparation, 2024, §§ 169-207, pp. 92-108.

682 Ongwen, reparation, 2024, § 555, p. 244.

## 7. REPARATION FOR DESTRUCTION OF HISTORICAL MONUMENTS OF TIMBUKTU[683]

The Al Mahdi case, where the indictee, former chief of the Hisbah, the 'police of morals', entered into guilty plea, has been the shortest case of the court so far. The trial was limited to his liability for the destruction of the monuments listed by the Unesco as elements of the cultural heritage of humanity[684] having occurred between April 2012 - January 2013, when fundamentalist Islamist armed formations[685] ruled the city and its neighbourhood.

Since the fundamentalists' eviction from Timbuktu in January 2013 by Malian forces, assisted by special units of the French army, the destroyed monuments have been reconstructed from the ruins by an impressive international technical cooperation organized by the UNESCO. However, the reparation as a legal procedure embraced also natural persons in addition to the reconstruction of the buildings.

The reason is that some of the monuments serve as ancestors' holy tombs and the descendants were mandated by local custom to maintain and protect them as well as to show them to visitors. In fact, these families made their living from the entrance fees paid by tourists and visitors since tourism was the main source of income of the whole city. Unfortunately, the current situation in Mali and especially the insecurity of the Timbuktu region hampers the return of the formerly experienced high scale of foreign and Malian visitors.

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683 For a deep analysis, see Lostal, 2021, pp. 831–854.

684 "Ten protected objects were attacked in Timbuktu, Mali, between around 30 June 2012 and 11 July 2012 ('Protected Buildings'): (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door; and the two mausoleums adjoining the Djingareyber Mosque, namely the (ix) Ahmed Fulane Mausoleum and (x) Bahaber Babadié Mausoleum" Al Mahdi, reparation, 2017, § 1, p. 4.

685 The two formations were the AQMI (Al-Qaida au Maghreb Islamique) and the Ansar Dine ("defensors of the faith").

When defining the cercle of those who were eligible for reparation, the trial chamber put emphasis on the social proximity of the victim and the destructed monument: "(...) the Chamber awards individual reparations for consequential economic loss only to those whose livelihoods exclusively depended upon the Protected Buildings. An individualised response is more appropriate for them, as their loss relative to the rest of the community is more acute and exceptional."[686]

Concerning moral harms, the chamber stated that "those whose ancestors' burial sites were damaged in the attack (such as the 'descendants of the saints') have a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population. The Chamber therefore considers that individual reparations through compensation are necessary to address the mental pain and anguish they suffered. But the remainder of the reparations awarded to the entire community of Timbuktu must be collective in character." [687]

In fact, individual financial reparation was recognized to the closest victims while a collective reparation was granted to all the other members of the local community with due respect for the importance of symbolic reparation[688] in the hope that "the effects of these measures will ripple out so as to address the moral suffering endured by people throughout Mali and the international community." [689]

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686 Al Mahdi, reparation, 2017, § 81, p. 32.

687 Al Mahdi, reparation, 2017, § 89, p. 36.

688 "90. The Chamber therefore orders that the moral harm caused by Mr Al Mahdi necessitates: (i) individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack and (ii) collective reparations for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation and collective reparations through rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Buildings. These collective reparations can also include symbolic measures – such as a memorial, commemoration or forgiveness ceremony – to give public recognition of the moral harm suffered by the Timbuktu community and those within it." Al Mahdi, reparation, 2017, § 90, pp. 36-37. Similarly: § 104, p. 41.

689 Al Mahdi, reparation, 2017, § 91, p. 37.

As to the precise volume of the individual and collective reparations, the experts appointed by the Chamber[690] gave very different and sometimes contradictory estimations.

The order recalled that the Unesco, whose contribution amounted to 2,58 million euros, 38 % of which were devoted the reconstruction[691], does not claim the reimbursement of these costs. The reparation of the other direct material harms was evaluated to be 97 000 euros[692]. The trial chamber considered the volume of the indirect material harms calculated by the commissioned experts[693] (i.e. 44,6 million euros) excessive and it ordered a far smaller sum (i.e. 2,12 million euros) emphasizing that the current collapse of tourism is due to the insecurity and other factors linked to the former islamist rule in general and not merely the consequence Al Mahdi's actions[694]. 483 000 euros were pronounced for immaterial harms[695], taking into account also a judicial decision rendered in a lawsuit between Eritrea and Ethiopia showing some similarities with the case at hand.[696]

In sum, the total volume of Al Mahdi's obligation was 2,7 million euros.[697] The trial chamber mandated the Trust Fund for Victims to identify the victims eligible to individual reparation[698] according to the following parameters: the given person should be *i.* a descendant of the person whose tomb was destructed or humiliated and/or *ii.* his

690 International Criminal Court, 2017i.

691 "116. The Chamber received information that UNESCO has spent over 2.53 million euros in rebuilding Timbuktu's mausoleums and rehabilitating the mosques and libraries of manuscripts. However, this number reflects the total of all such projects UNESCO undertook, and not only the restoration of the 10 Protected Buildings at issue in the present case. The Chamber received information from the appointed experts that the number most representative of the actual cost of the work in restoring the mausoleums is just over 96,600 euros." Al Mahdi, reparation, 2017, § 116, p. 45.

692 Al Mahdi, reparation, 2017, § 118, p. 46.

693 Al Mahdi, reparation, 2017, § 121, p. 47.

694 Al Mahdi, reparation, 2017, §§ 119-127, pp. 46-49.

695 Al Mahdi, reparation, 2017, § 133, p. 52.

696 Al Mahdi, reparation, 2017, § 131, p. 51.

697 Al Mahdi, reparation, 2017, § 134, p. 52.

698 Al Mahdi, reparation, 2017, § 144, p. 55.

income should come exclusively from the presentation of the mausoleum to the tourists.[699]

The Trust Fund for Victims was instructed to treat the beneficiaries' names registered during the evaluation of immaterial harms as confidential data.

Although the representatives of victims submitted an appeal contesting the eligibility criteria and the role attributed to the Trust Fund, the Appeals Chamber confirmed the order although it added that the chamber should grant a judicial review procedure over the eligibility decisions of the Trust Fund.[700] " The Appeals Chamber has found that the Trial Chamber should maintain judicial control over the entire reparations proceedings, including the screening process that will be undertaken by the TFV. Applicants for individual reparations should be able to contest before the Trial Chamber the decision taken by the TFV on their eligibility for individual reparations, and it is for the Trial Chamber to make the final determination in this respect. The Trial Chamber may also review the assessment by the TFV *proprio motu*. The Impugned Decision is amended to this extent."[701]

The realization of the reparations went through the preparation of implementation plans for individual as well as for collective reparations. The trial chamber rejected the submissions aiming to increase

699 "145. The Chamber recalls that individual reparations are to be awarded to: (i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors' burial sites were damaged in the attack. Given the role of the descendants of the saints in guarding and maintaining the Protected Buildings, it is likely that many of those identified in each of these groups will be the same individuals. Bearing this in mind, the Chamber considers that one screening for both categories is sufficient. It is also emphasised at the outset that anyone not participating in the screening can still participate in collective reparations programmes – the screening process concerns only individual reparations." Al Mahdi, reparation, 2017, § 145, pp. 55-56.

700 "Victim applicants, who the Trust Fund for Victims finds, as a result of the administrative screening, ineligible for individual reparations, are entitled to request that the Trial Chamber review the assessment by the Trust Fund for Victims. The Trial Chamber may also review the assessment by the Trust Fund for Victims *proprio motu*."
International Criminal Court, 2018c, § 1, p. 4. (In the followings: Al Mahdi, reparation, appeal, 2018)

701 Al Mahdi, reparation, appeal, 2018, § 98, p. 47.

the sum of the individual reparation and to change the individual and collective components of the reparation.[702]

Concerning collective reparations, the Trust Fund for Victims submitted nine plans from which five were directly related to the monuments: " (i) rehabilitation of doors, windows and enclosures (to entail the rehabilitation of the cemetery walls, the planting of trees and a living hedge, improved lighting, and surveillance); (ii) logistical support [REDACTED]; (iii) workshops designed to improve capacity-building for those protecting and maintaining the buildings; (iv) a support fund for the buildings' customary annual maintenance; and (v) [REDACTED]."[703]

In the framework of collective reparation for economic harms, two projects were conceived granting "(vi) assistance for the return of victims to Timbuktu and (vii) an Economic Resilience Facility ('ERF') to support economic initiatives proposed by members of the Timbuktu community."[704] In order to repair moral harms, the TFV proposed "(viii) implementing a programme for psychological support [REDACTED] and (ix) creating safe spaces for women and girls."[705]

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702 "54. The Chamber is alive to the fact that the assessment may result in some individual victims receiving less than they think is fair. But a decision to increase the size of the individual awards to victims cannot be taken in the abstract. In the Reparations Order, the Chamber set Mr Al Mahdi's liability at 2.7 million euros: that figure is final. Were the Chamber to accept the LRV's proposal to increase the individual reparations awards, that would mean that less money would be available for the collective reparations. The real issue for the Chamber here is the opportunity cost which an increase to the individual award component of the reparations would entail. Having considered the LRV's arguments, the Chamber is of the opinion that the reduction in the collective reparations awards which would result from the LRV's proposal rules out any change to the TFV's figures."
International Criminal Court, 2019m, § 54, p. 17. (In the following: Al Mahdi, 2nd decision, implementation, 2019)

703 Al Mahdi, 2nd decision, implementation, 2019, § 66, p. 20.

704 "67. The TFV makes two proposals for collective reparations for economic harm: (vi) assistance for the return of victims to Timbuktu and (vii) an Economic Resilience Facility ('ER F') to support economic initiatives proposed by members of the Timbuktu community." Al Mahdi, 2nd decision, implementation, 2019, § 67, p. 20.

705 Al Mahdi, 2nd decision, implementation, 2019, § 68, pp. 20-21.

(As you can see, only projects that are not concerned by confidentiality can be cited. The redactions concern the name of the institutions participating in the realization of the projects.)

The plans were approved by the Trial Chamber, which also emphasized the need for a symbolic reparation[706]. Al Mahdi decided to express his regret for the wrongs done. The Trust Fund was ready to 'advance' at least 1,35 million euro (i.e. half of the sum) in the hope that new state or private contributions would put the scale higher. [707]

Finally, by the closure of the program in 2022, ninety-five people were declared eligible for individual reparation.[708] Some local media gave a higher number (e.g. one thousand people[709]) but probably they did not properly distinguish between eligible applicants and family members or those who benefited from some aspects of the collective reparation. The symbolic sum of one euro, stipulated already in the reparation order,[710] was solemnly handed over to the representative of the Unesco[711] and the registered version of Al Mahdi's words rec-

706 Al Mahdi, 2nd decision, implementation, 2019, § 97, pp 30-31.

707 Al Mahdi, 2nd decision, implementation, 2019, § 101, p. 32.

708 International Criminal Court, Assembly of States Parties to the Rome Statute, 2022b, § 116, p. 18.;
International Criminal Court, 2020k.

709 Available at: https://www.rfi.fr/fr/afrique/20201129-mali-le-fond-de-la-cpi-à-bamako-pour-indemniser-les-victimes-d-ahmad-al-faqi-al-mahdi (Accessed: December 2023)
(The article cites a TFV program-manager who is much more reserved ("Il y aura après des réparations collectives et là, il est difficile de dire combien de personnes seront touchés, précise Aude Le Goff, responsable du programme du fonds de réparation des victimes. Mais le but de cette décision, c'est justement de dire que toute la communauté dans son ensemble a été victime, et doit bénéficier de réparations.") than the journalist writing that "[e]nviron un millier de personnes, principalement les ayants droits des saints des mausolées détruits à Tombouctou en 2012 lors de l'occupation terroriste, bénéficieront de compensations financières individuelles."

710 Al Mahdi, reparation, 2017 § 107, p. 42. See also Al Mahdi, 2nd decision, implementation, 2019, §§ 89- 90, p. 29.

711 „Mali and UNESCO to receive a "symbolic euro" in token reparation for the heritage of Timbuktu". Available at: https://www.unesco.org/en/articles/mali-and-unesco-receive-symbolic-euro-token-reparation-heritage-timbuktu (Accessed: December 2023); The Trust Fund for Victims, 2021b.

ognizing his liability and begging for forgiveness[712] received a rather positive echo.[713]

## 8. CONCLUDING REMARKS ON THE REPARATIONS

The sums ordered so far in the four reparation procedures, i.e. 10 million USD in the Lubanga case, 31,3 million USD in the Ntaganda case, 1 million USD in the Katanga case, 52,4 million euros in the Ongwen case and 2.7 million euros in the Al Mahdi case are all related with the specificities of the cases.

These figures cannot be considered as an aggregate of sums that the recognized beneficiaries will materially have in hand.

They mean the scope of the financial liability of the condemned perpetrator. However, as Stahn says "[t]he ability of perpetrators to do harm is far greater than their ability to repair damages."[714] Or as Mégret writes, "[o]ne might say that the source of all problems with reparations before the ICC is the nefarious ability that individuals have for causing harm on a magnitude that is incommensurable with their ability to repay it."[715]

It must be admitted that a considerable part of the victims, especially in 'situation countries' like in the already adjudged cases, would like to see the reparation in form of cash and the chambers acting in reparation matters also recognized the importance to award an

712 "I am really sorry, I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, Mali, and I'm really remorseful about what I had caused the international community as a whole." Transcript of Hearing, Al Mahdi (ICC-01/12-01/15-T-4-Red-ENG), 22 August 2016, at 8, lines 13–16, cited also in: Lostal, *op. cit* p. 840.

713 „Malian extremist apologizes to world court for Timbuktu destruction". Available at: https://english.alarabiya.net/News/world/2021/10/12/Malian-extremist-apologizes-for-to-world-court-Timbuktu-destruction- (Accessed: 1 July 2023); Laplace, 2021; "Ahmad Al Faqi Al Mahdi: "I plead guilty"". Available at: https://www.unesco.org/en/articles/ahmad-al-faqi-al-mahdi-i-plead-guilty-0 (Accessed: 1 July 2022).

714 Stahn, 2018, p. 408.

715 Mégret, 2016, p. 253.

'individual monetary component' of collective reparations. Even if symbolic, this small sum can help the victims' family.

As already mentioned, if the given person is indigent – and this was certified in all the above mentioned four cases –, this is the duty of the Trust Fund for Victims to step in and *de iure* advance but *de facto* cover the costs of the reparation from the voluntary donations made by governments, private companies and individuals.[716] These contributions are sometimes earmarked (i.e. linked to a certain case or to a certain type of victims), but generally, it is left on the discretion of the Trust Fund for Victims how to distribute them among its programs under assistance mandates and reparation mandates. For all these reasons, the Trust Fund for Victims has been continuously emphasizing that in case of mass crimes producing huge number of victims involving consequently very high costs of reparation, collective reparation is the only reasonable policy, eventually completed with individual components aiming to grant medical, psychological and professional educational services needed for the victims' rehabilitation and social reintegration with the purpose of income-generating activities. All this should be done according to the *'Do no harm!'* principle to avoid re-traumatization and with due attention to prevent an eventual renewal of ethnic jalousies.[717]

The Trust Fund for Victims does not only the collect donations but also organizes and arranges the local national or NGO-based services securing the special reparation programs.

In this context, the Trust Fund for Victims have repeatedly received judicial warnings that instead of developing lengthy abstract legal considerations in their submissions, the formulation of precise, factual, technical and numerical proposals would better serve the interests of the victims' reparation.[718] These notices seem to have achieved their expected purpose.

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716 Stahn is right when remarking that "[a] fundamental dilemma of ICC reparation policy is financial sustainability. Due to the indigence of defendants, the main burden falls on the strained budget of the Trust Fund."
Stahn, 2018, p. 406.

717 Vincent, 2010, p. 101., p. 103.; Bindu, 2020, p. 23., p. 26.

718 Pellet, 2019, p. 2000. ; Saint-James, 2017, p. 846.

On the other hand, the chambers acting in reparation matters have always emphasized the respect of the respective competences of the Trust Fund.[719]

It is often evoked by governmental representatives of the Assembly of States Parties and scholars that reparation procedures are too long and too complicated[720], which might be linked with some legal lacunas

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719 "817. The Chamber takes note of the competences of the TFV's Board of Directors, as stipulated in the Regulations of the Trust Fund for Victims, adopted by the Assembly of States Parties, on the basis of Article 79(3) of the Statute. The Chamber also underlines the competences of the Board of Directors over the use of the its 'other resources' and the Court's well-established jurisprudence around it. Although the complement to reparations by the TFV is legally only an 'advancement' to be reimbursed by the convicted person, the experiences acquired during the past reparations procedures of the Court show that the chances of reimbursement are in reality very low, due to the high financial expenses of the reparation services and the continuing indigency or low income of the convicted persons.
818. In this context, the Chamber puts emphasis on the fact that the TFV's Board of Directors is entitled to shape the timing of the delivery of the different components of the reparation according to the results of its fundraising activities and the collected resources, which could have an impact on the implementation of the reparations awarded.
819. Accordingly, and noting Mr Ongwen's indigence, the Chamber acknowledges that it would be for the TFV's Board of Directors to determine whether and when to use its 'other resources' to complement the reparations awarded in the present case. The Chamber encourages the TFV to complement the reparation awards, to the extent possible, and engage in additional fundraising efforts to the extent necessary to complement the totality of the award.
Nevertheless, the Chamber understands that, in order for the TFV to be able to fully complement the award, substantial fundraising will need to take place. The Chamber reiterates that, depending on the information to be provided by the TFV in its DIP, it may need to allow for a phased and flexible approach to the implementation of the collective community-based reparations awarded, including by allowing additional prioritisation and adjustments according to the availability of funds. The Chamber indeed acknowledges that even when duly observing the priorities established by the present Order, the TFV may need to establish additional 'subpriorities'." Ongwen, reparation, 2024, §§ 817-819, pp. 357- 359.

720 See e.g. Hamilton, Sluiter, 2022, pp. 272-317.; Moffett, Sandoval, 2021, pp. 768-769.; Stahn, 2018, pp. 410-411.

in the statutory texts.[721] Some scholars argue not only for the simplification of the procedure but also for mandating situation countries to participate in the decision-making on reparation by applying the ICC reparation orders – which should be formulated in a given criminal case in a less precise but more abstract manner under this hypothesis – on the field through executing the task of eligibility screening and a certain part of the management of the reparation according to an approach called *'reparative complementarity.*[722]

Regarding the actual financing of the reparations, the present sharp distinction of 'own' and 'other' resources might also need revision. Although reparations should rely on the 'own resources', these are however actually very limited. As already mentioned, the current legal regime restricts the 'own resources' to fines and forfeiture and all other contributions – even contributions coming from ICC judges, other professionals and donors whether within or outside the ICC – go into the 'other' resources. One possible way to enlarge the volume of the 'own resources' is to open it to a certain type of contributions. The alimentation of its envelope with a fixed mandatory percentage of the 'other resources' would also be imaginable.

It is however clear that the realization of these ideas presupposes not only a jurisprudential but also a statutory reform.

Nevertheless, it can be rightfully asked what the reason for a sharp distinction between assistance mandate and reparation mandate is if the services offered under one and the other will be very similar at

721 "Hard choices, compromises, and unclear legal provisions, all permeating the Rome negotiations, have been carried into the reparations regime and currently loom over the Court's practice and its potential to contribute to reparative justice." Balta, 2020, p. 136. See also: Pellet, 2019, p. 1990., p. 2006.; Bassiouni, 2016, p. 241.; Mégret, 2016, p. 253.

722 Mofett, 2012, pp. 368-390.; Hamilton, Sluiter, 2022, p. 312.; Leyh, Fraser, 2019, pp. 54.

the end[723] – as the pragmatic solution decided after the outcome of the Bemba proceedings shows[724].

In their current stage of the statutory coordinates, it is very unlikely that the chambers or the Trust Fund for Victims could qualitatively simplify and accelerate the procedure. In the Abd-Al-Rahman case, the Appeals Chamber, reacting on a motion coming from the defence[725] suggesting some steps to be taken already at pre-trial stage[726], once again emphasized the need of the scrupulous observation of the currently existing limits.[727] Taking into account the states' reluctance

723 Mégret, 2016, p. 260.

724 Ambach, 2019, p. 142.

725 Requête et observations sur les réparations en vertu de l'Article 75-1, ICC-02/05-01/20-98 17-07-2020, available at: https://www.icc-cpi.int/CourtRecords/CR2020_04541.PDF

726 The Appeals Chamber recapitulated as follows the proposal:
"Despite characterising his Request as a proposal for the adoption of 'additional principles', ostensibly submitted with reference to article 75(1) of the Statute, a plain reading of Mr Abd-Al-Rahman's Request reveals that he proposed something very different. Mr Abd-Al-Rahman's Request outlined a modified procedure for the submission and assessment of applications for reparations in nine separate stages, by which nearly the entire proceeding concerning reparations would occur before and largely independent of an eventual conviction of Mr Abd-Al-Rahman in the criminal proceedings against him, under the supervision of the Pre-Trial Chamber. Under his proposal, the Registry would complete the submission of applications to the Court during the pre-trial phase, presenting any information and recommendations about the modalities of reparations, the implementation of awards, or other matters to the Pre-Trial Chamber. At that time, the Pre-Trial Chamber would order the Registry to disclose the applications to the Trust Fund for Victims (the 'TFV'), and after receiving the applications it would make public calls for voluntary contributions. The Pre-Trial Chamber would then close the period for applications for reparations, and the TFV would assess the amount necessary to finance the remedies sought. Based on a report from the TFV, the Pre-Trial Chamber would then make an order for implementation of the modalities of reparations." International Criminal Court, 2020l, § 18, pp. 9-10. (In the followings: Appeals Chamber, reparation, Al-Rahman, 2020).

727 "Although the legal framework governing reparations leaves a considerable amount of discretion to judges as to how to conduct reparations proceedings, there is no room to order a bifurcation of the proceeding as suggested in Mr Abd-Al-Rahman's Request. The Appeals Chamber notes, in particular, that one aspect of the procedure for reparations at the Court provides that the final decision on the scope of damage and the determination of modalities

to touch upon the Rome Statute – which is more or less understandable – the '*toilettage*' of the Regulations of the Trust Fund for Victims would serve the aim of a desirable simplification and consequently a shorter procedure.

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for reparations take place after the trial has concluded. This is most evident in rule 97 of the Rules, entitled 'Assessment of reparations', in which there are numerous references to the 'convicted person', indicating that the final assessment of reparations should take place after the close of the criminal trial. Moreover, the Appeals Chamber notes that the only 'order' that may be issued concerning reparations under article 75 of the Statute, entitled 'Reparations to victims', is the one mentioned in subparagraphs (2), (3), and (4), made 'directly against a convicted person'." Appeals Chamber, reparation, Al-Rahman, 2020, § 20, p. 11.

# CHAPTER VII

# Interim measures in the practice of the International Court of Justice and the International Criminal Court[728]

## 1. INTRODUCTION

Comparative international jurisprudence is a theme often analysed by international lawyers because it makes it possible to check the fertilizing capacity of an international court with regard to other tribunals of the international community. The contribution of the European Court of Human Rights to the renewal of the jurisprudence of the European Court of Justice and *vice versa* as well as the jurisprudential interaction between the different regional human rights courts or the emergence of the legacy of the International Military Tribunal of Nuremberg in the jurisprudence of the ICTY[729], ICTR[730] or the comparison of the jurisprudence of ICTY, ICTR with that of the ICC or the hybrid tribunals (SCSL[731], ECCC[732] , STL[733] etc) are the best known examples for this profile of researches. The impact of the jurisprudence

728 This chapter was published originally in: Palombino, F.M., Virzo, R., Zarra, G. (2020) (eds.): *Provisional Measures Issued by International Courts and Tribunals*. The Hague: T.M.C. Asser Press, pp. 147-170. https://doi.org/10.1007/978-94-6265-411-2_8
I thank Giovanni Zarra for his consent to the republishing.

729 International Criminal Tribunal for the former Yugoslavia

730 International Criminal Tribunal for Rwanda

731 Special Court for Sierra Leone

732 Chambers in the Courts of Cambodia

733 Special Tribunal for Lebanon

of the ICJ and the PCIJ on other permanent tribunals or arbitrations has also been deeply analysed.

This does not, however, render it superfluous to review the practice of the International Court of Justice and the International Criminal Court with only on one aspect in the centre of interest, i.e. the *interim measures* called *magma* by Jean-Marc Sorel[734] and *element of drama* by Shabtai Rosenne.[735]

It is to be noted that this analysis has also its limits because interim measures do not have the same content in the practice of the ICJ and in that of the ICC. As far as before the ICJ measures of conservation and interim measures/provisional measures cover more or less the same entities, at the ICC (and according to the terms of the Rome Statute) the notion of measures of conservation is used to call some precise forms of a greater amount of what is called interim measures by scholars, a notion unused in the Rome Statute. Moreover, as usual, a slight difference may be felt between the French and the English versions of the Rome Statute.

Article 41 of the Statute of the ICJ gives a rather large and discretionary mandate to the judges to impose *"provisional measures"* ("mesures conservatoires" in the French text)[736] and the procedural details are regulated in articles 73-74 of the Rules of the Court.)

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734 "Un magma peu identifiable où urgence, provisoire et conservatoire jouent des rôles complémentaires et confondus." Sorel, 2003, p. 52.

735 "The inherent nature of provisional measures proceedings and the factor of urgency supply an element of drama which fits in well with modern practices of diplomacy by television and the Internet." Rosenne, 2006, p. 1416.

736 Statute of the ICJ, Article 41 (1):
"The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. (2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council."
French version: "La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire. (2) En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité."

No mention of "interim measures" or "provisional measures" can be found in the English text of the Rome Statute and even the French version contains the expression "mesures conservatoires" *verbatim* only once.[737]

The Rome Statute often uses the word "measures" and it depends on the context whether they should be understood as interim measures. There are, however, a range of other expressions, like in article 18 (6) *unique investigative opportunity*[738], or protective measures

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737 Rome Statute, Article 57 (3):
"In addition to its other functions under this State, the Pre-Trial Chamber may (....) (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims."
French version:
Statut de Rome: Article 57 (3):
"Indépendamment des autres fonctions qui lui sont conférées en vertu du présent Statut, la Chambre préliminaire peut : (...) (e) Lorsqu'un mandat d'arrêt ou une citation à comparaître a été délivré en vertu de l'article 58, solliciter la coopération des États en vertu de l'article 93, paragraphe 1, alinéa k), en tenant dûment compte de la force des éléments de preuve et des droits des parties concernées, comme prévu dans le présent Statut et dans le Règlement de procédure et de preuve, pour qu'ils prennent des mesures conservatoires aux fins de confiscation, en particulier dans l'intérêt supérieur des victimes."

738 Rome Statute, Article 18 (6):
"Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."
French version:
Statut de Rome, Article 18 (6):
"En attendant la décision de la Chambre préliminaire, ou à tout moment après avoir décidé de surseoir à son enquête comme le prévoit le présent article, le Procureur peut, à titre exceptionnel, demander à la Chambre préliminaire l'autorisation de prendre les mesures d'enquête nécessaires pour préserver des éléments de preuve dans le cas où l'occasion de recueillir des éléments de preuve importants ne se représentera pas ou s'il y a un risque appréciable que ces éléments de preuve ne soient plus disponibles par la suite."

(or appropriate measures to protect or measures to ensure the protection ) for/of witnesses and victims (article 43 (6), article 68(1), article 87 (4) ) or pieces of evidences (article 54 (3)(f), article 56 (3) (a) ). We can also refer to the arrest warrants (article 58) or the request for provisional arrest (article 92). In the Rules of Procedure and Evidence, rules 57 (provisional measures under article 16, § 6), 87 (protective measures) and 88 (special measures) should be noted the regarding procedural details.-

The wording "interim measures" being absent from the Rome Statute, expressions "interim measures *lato sensu*" and "interim measures *stricto sensu*" will be used in the following pages to describe the practice of the ICC in order to allow us to compare the institutions and judicial procedures of the ICC and the ICJ. While admitting that "interim measures *stricto sensu*" and " interim measures *lato sensu* " do not appear at all in the Rome Statute, I will use the expression "interim measures *stricto sensu*" as being very close[739] to what the ICJ understands under *interim measure* in English but as *"mesures conservatoires"* in French and which appears in the precited French text of article 57(3) of the Rome Statute also as *"mesures conservatoires"* but which appears in the English text however as "protective measures". "Interim measures *lato sensu* " will be used for other type of measures – appearing however under different terms - when this logical similarity is still recognizable despite of the fact that the two approaches are not that close to each other.

*Infra*, I try to compare the interim measures to be adopted by these two judicial bodies according to (1) their purpose, (2) their preconditions, (3) the parties or actors mandated to submit a claim for their triggering (4) the most important procedural rules of their adoption, (5) their intended recipient, (6) their legal nature, (7) their characteristics and their most typical forms and (8) their efficacy.

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739 As I mentioned supra, the French version of the Rome Statute is using effectively once "measure conservatoire" to one type of these measures. (See the French version of Article 57(3) in the footnote n°737, *supra*.)

## 2. THE MOST IMPORTANT ISSUES OF INTERIM MEASURES

### 2.1. The purpose of the interim measures before the ICJ and the ICC

#### 1.2.1.

In order to get closer to the purpose of the interim measures of the International Court of Justice and taken into account the silence of the Statute and the Rules of the ICJ, one can recall often evoked phrases like: „ the purpose of provisional measures to preserve" rights which are the subject of dispute in judicial proceedings" (...)"[740] and the ICJ uses this tool in order „to ensure in the context of these proceedings, that no irreparable damage is caused to persons or property in that area pending the delivery of its Judgment"[741]. As Alain Pellet puts it, the necessity of a speedy action is explained by the volume of the danger.[742] In more general terms, the purpose of interim measures embraces the preservation of evidences, the diminishing of tensions, the creation of basis for negotiations and contributions to international peace and security.[743]

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740 International Court of Justice, 1991, p. 17, § 22.
(When the Court cited the "rights which are the subject of dispute in judicial proceedings", it referred to the case of International Court of Justice, 1979, p. 19, § 36. and International Court of Justice, 1986, p. 8, § 13.)
See e.g. from the latest jurisprudence: "Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Order of 23 July 2018, Request for the indication of provisional measures, § 43:"
"The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a case, pending its decision on the merits thereof."

741 International Court of Justice, 2011, p. 552, § 61.

742 "(...) l'adoption d'une ordonnance en ce sens permet à la Haute Juridiction de réagir avec célérité dans des situations de grand péril." Pellet, 1989, p. 561.

743 Kempen and He, 2009, p. 929.

Considerations on purpose are going hand in hand with the explanation of urgency[744] or necessity. "(...) provisional measures (...) are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given;"[745] The vocabulary is very similar in a series of orders[746] and the word "irreparable" is nearly always present with the exception of the judgment in the LaGrand case[747]. (But let us keep in mind that the preceding order rendered in the LaGrand case used the word "in conformity with the established practice".[748])

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744 "L'urgence dans le contentieux international est une règle standard à contenu variable qui laisse une grande liberté au juge pour faire face à des situatins qui ne sont pas toujours clairement tranchées ou identifiées, et grâce à laquelle le juge délimite le caractère normal ou non d'un ensemble de faits, puis en induit un certain nombre de conséquences précises. L'urgence comme standard juridique est donc tout à la fois un modèle de comportement et un modèle de situation." Jouannet, 2001, p. 210.

745 International Court of Justice, 1991b, p. 17, § 23.

746 See for example: The recapitulation in the order in the LaGrand case:
"23. Whereas the Court will not order interim measures in the absence of "irreparable prejudice to rights which are the subject of dispute ..." International Court of Justice, 1973, p. 103.; International Court of Justice, 1979, p. 19, § 36.; International Court of Justice, 1993, p. 19, § 34.; International Court of Justice, 1998, p. 257, § 36.;
International Court of Justice, 1998, p. 15, § 23.;
See also: International Court of Justice, 1986b, p. 8, § 13.; and also Preah Vihear (n°2):
"Whereas the Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings (...)" International Court of Justice, 2011, p. 548, § 46.;
Text quasi verbatim identical in:
International Court of Justice, 2016, p. 1168, § 82-83.; International Court of Justice, 2018, § 61.; International Court of Justice, 2017, p. 243, § 50.; International Court of Justice, 2017b, p. 136 § 89.; International Court of Justice, 2016, p. 1169, § 90.

747 "(...) the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court." International Court of Justice, 2001, p. 503, § 102.

748 " International Court of Justice, 1999, p. 15, §§ 22 et 24.

Recently, the ICJ went to a human rights relating directions in order to give examples of the irreparable harm[749], extending the notion also to the security of civil aviation.[750]

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749 Because of the similarity between the LaGrand and Jadav cases, it is not surprising, that in the latter, the suspension of the execution of the capital punishment was ordered. International Court of Justice, 2017, p. 245, §58.
The ICJ went however on other fields of the human rights as well:
"As the Court has already observed, individuals forced to leave their own place of residence without the possibility of return could, depending on the circumstances, be subject to a serious risk of irreparable prejudice (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, § 142). The Court is of the view that a prejudice can be considered as irreparable when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress; when students are prevented from taking their exams due to enforced absence or from pursuing their studies due to a refusal by academic institutions to provide educational records; or when the persons concerned are impeded from being able to physically appear in any proceedings or to challenge any measure they find discriminatory"
(...)
"The Court indicates the following provisional measures: (..) (1) The United Arab Emirates must ensure that
(i) families that include a Qatari, separated by the measures adopted by the United Arab Emirates on 5 June 2017, are reunited; (ii) Qatari students affected by the measures adopted by the United Arab Emirates on 5 June 2017 are given the opportunity to complete their education in the United Arab Emirates or to obtain their educational records if they wish to continue their studies elsewhere; and (iii) Qataris affected by the measures adopted by the United Arab Emirates on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;"
International Court of Justice, 2018, § 69 and § 79.

750 "Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment may have a serious detrimental impact on the health and lives of individuals on the territory of Iran. "
International Court of Justice, 2018, § 91.

### 1.2.2.

As to the International Criminal Court, the purpose of interim measures can be already seen in some dispositions of the Rome Statute.

Indeed, in case of the so called "unique investigative opportunity", the Rome Statute empowers the Pre-Trial Chamber to take such measures upon request of the Prosecutor, as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.[751]

The role of the defence may vary however according to the fact whether the suspect is at large or in custody.[752]

Adopting these measures, the harmful effects of a ping-pong[753] between national authorities and the ICC or of wartime destructions[754] can be avoided and the collected pieces of evidence, e.g. records of exhumations[755] or DNA remnants[756] can be presented during the subsequent phases of the procedure.

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751 Rome Statute, Article 56, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity, (see in particular § 1 (b) of article 56.)

752 "In circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel's mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects insofar as counsel can, in the circumstances, identify them."
Schabas, 2016, p. 874.

753 Taylor, 2017.

754 "(...) steps under this paragraph would include a war that paralyses the national authorities' investigations, uproots or displaces potential witnesses or results in fatalities or in evidence being destroyed."
Nsereko, 2016, p. 847.

755 According to Klamberg, "the rationale is that some evidence cannot be fully reproduced at trial, for example mass grave exhumations" Klamberg, 2017b.; See also: Guariglia, Hochmayr, 2016, p. 1414.

756 In Triffterer, the example of exhumations are completed by reference on DNA analysis or testimony of a patient in a terminal phase. The commentators evoke the discussion in Rome on the collections of testimonies of victims in danger. The issue was not decided in Rome but Guaraglia and Hochmayr answer affirmatively the question.
See: Guariglia, Hochmayr, 2016, p. 1415.

It is not surprising that as far as the arrest warrant is concerned, the purpose is the same as in national judicial systems: to assure appearance, to avoid hindrance to the investigation and to prevent that further crimes are committed.[757] Measures for the protection of victims and witnesses have also the same purpose as in national law.[758] The "intermediaries" i.e. those who help the ICC on the field to contact victims and witnesses can also be covered by these measures, preceding the disclosure of their identity.[759] (In a given case, the defence tried in vain to use this institution for requiring asylum for his client, Ngudjulo, who was acquitted by the Trial Chamber but who did not want to return to his country from fears "for his safety and well-being in his home country"[760] namely the DRC.)

As far as interim measures *stricto sensu* are concerned, i.e. the freeze of assets[761], the reference of the Rome Statute to the "ulti-

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757 Rome Statute, Article 58:
"Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear
1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
(b) The arrest of the person appears necessary:
(i) To ensure the person's appearance at trial;
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."

758 Rome Statute, Article 68: Protection of the victims and witnesses and their participation in the proceedings:
"1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. (...) The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

759 Hansberry, 2011, p. 366.

760 Chaitidou, 2013, p. 153.

761 Rome Statute, Article 57, § 3 (e), precited.

mate benefit of victims" was translated as "nécessaire dans l'intérêt supérieur des victimes pour garantir que (...) lesdites victimes puissent (...) obtenir réparation des préjudices qui peuvent leur avoir été causes."[762] It is not a precondition that the given items or financial assets have a link with the crime for which the arrest warrant was issued.[763] The connection with another disposition of the Rome Statute – especially in the French version - may suggest such a restrictive interpretation [764] but the judges – in a majority decision adopted in the Kenyatta case – rejected this possibility relying rather on a teleological approach,[765] which was developed by the Pre-Trial Chamber in the Lubanga case.[766]

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762 ICC-01/05-01/08-08-US-Exp (reclassified "Public"), § 7. (The author's remark: the "Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise" had only Portuguese but no English translation).

763 Guariglia, Hochmayr, 2016, p. 1435-1436.

764 Rome Statute, Article 93, Other forms of cooperation (...) (1) k:
"The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties";
Statut de Rome, Article 93, Autres formes de coopération (...) (1) k:
"L'identification, la localisation, le gel ou la saisie du produit des crimes, des biens, des avoirs et des instruments qui sont liés aux crimes, aux fins de leur confiscation éventuelle, sans préjudice des droits des tiers de bonne foi";

765 "11.The Chamber notes the submission of the Kenyan Government that the implementation of a cooperation request under Article 93(1)(k) of the Statute relating to identifying, tracing and/or freezing assets or property of an accused person requires an express finding that such assets or property were instrumentalities of a crime or that they came into the possession of the person upon execution of the crime."
"12. The Majority considers that the statutory framework does not require any such nexus to be established when ordering protective measures under Article 57(3)(e). (...)"
The Prosecutor v. Uhuru Muigai Kenyatta, 08 July 2014, ICC-01/09-02/11-931

766 "13. (...) The Majority shares the view of Pre Trial Chamber I that: [t]he teleological interpretation of article 57 (3) (e) of the Statute reinforces the conclusion arising from a contextual interpretation. Indeed, since forfeiture is a residual penalty pursuant to article 77 (2) [b] of the Statute, it will be contrary to the "ultimate benefit of victims" to limit to guaranteeing the future enforcement of such a residual penalty the possibility of seeking the cooperation of the States Parties to take protective measures under article 57 (3) (e) of the Statute".

In fact, the first fifteen years of the ICC justified Hervé Ascensio's prognosis that the legal possibility of the freeze will certainly be inadequate from the point of view of ensuring the necessary amount of money to repair the suffered harms of victims.[767] The condemnation pronounced before December 2018, i.e. those of Lubanga, Katanga and Al Faqi concerned indigent persons with the exception of the only wealthy indictee, Jean-Pierre Bemba Gombo, sentenced for murder and rape because of the commandant's responsibility - for eighteen years by the Trial Chamber but acquitted by the Appeals Chamber in 2018[768]. (However, as Mr. Bemba Gombo was condemned in two separate cases and the acquittal concerned only one of them, the fine imposed on him in the second case – i.e. witness tampering during his trial - was confirmed.[769])

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International Criminal Court, 2014d, § 13, p. 8. (In the followings: The Prosecutor v. Uhuru Muigai Kenyatta, 08 July 2014)

767 "(...) compte tenu de l'ampleur et de la nature des crimes entrant dans la compétence de la Cour, il est néanmoins probable que les confiscations opérées seront largement insuffisantes pour permettre l'indemnisation et que d'autres ressources seront nécessaires pour alimenter le Fonds d'indemnisation en faveur des victimes prévu à l'article 79 du Statut."
Ascensio, 2003.

768 Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red 08-06-2018

769 The Trial Chamber convicted M. Bemba Gombo also (again) for one year of imprisonment but it declared it as served, taking into consideration of the time effectively spent in custody.
"127. In addition, the Chamber again finds that a fine is a suitable part of the sentence. The Chamber recalls that there is a need to discourage this type of behaviour and to ensure that the repetition of such conduct on the part of Mr Bemba or any other person is dissuaded. Recognising Mr Bemba's enhanced culpability, and considering his solvency, the Chamber is of the view that he must be fined the same amount as before: EUR 300,000."
International Criminal Court, 2018i, § 127.

## 2.2. Preconditions for taking interim measures by the ICJ and the ICC

### 2.2.1.

As to the ICJ, the most important precondition is the existence of its jurisdiction over the case or more precisely that its competence is not manifestly excluded.[770] As it was pronounced in the case of Nicaragua vs. USA: "Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded (...)"[771]

Recently, the "plausibility" as a criterion has also appeared: "the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible"[772]

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770 Laurence Boisson de Chazournes: Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression des crimes de génocide, Annuaire français de droit international, vol. 39, 1993, p. 517

771 ICJ: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 10 May 1984, Request for the indication of Provisional Measures p. 179, § 24,
From the recent jurisprudence: ICJ: Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 236, § 15; Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Order of 3 October 2018, Request for the indication of provisional measures, § 24;

772 ICJ: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Order of 23 July 2018, Request for the indication of provisional measures, § 43. Here, the ICJ referred to the case of Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian

Moreover, it is mandatory that not only the requesting party but also the Court should be convinced of the urgency and the necessity of taking such a measure. (The ICJ may take it also *ex officio*[773], but up to now, this possibility has seemed to be left aside.) The onus of the proof is on the party requesting the interim measures. Information and guarantees received from the interested parties play a decisive role in the assessment. It happened already that having studied the information furnished and the promised assurances, the Court concluded that there was no such necessity at the given phase of the litigation, like in the Passage through Great Belt case[774] or in the case of Obligation to Prosecute or Extradite[775], but *a contrario,* the Court

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Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 126, § 63)
Similarly: "At this stage of the proceedings, the Court is thus not called upon to determine definitively whether the rights which Iran wishes to see preserved exist; it need only decide whether the rights claimed by Iran on the merits and which it is seeking to preserve, pending the final decision of the Court, are plausible."
ICJ: Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Order of 3 October 2018, Request for the indication of provisional measures, § 54

773 Rules of the ICJ, Article 75 (1) "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties."
See however Laurence Boisson de Chazournes's warning, i.e. „l'indication d'office de mesures conservatoires ne peut pas évincer le jeu du contradictoire." Laurence Boisson de Chazournes: *op. cit,* p. 528

774 „Whereas however the Court, placing on record the assurances given by Denmark that no physical obstruction of the East Channel will occur before the end of 1994, and considering that the proceedings on the merits in the present case would, in the normal course, be completed before that time, finds that it has not been shown that the right claimed will be infringed by construction work during the pendency of the proceedings."
International Court of Justice, 1991b, p. 18, § 27.

775 "Whereas, as the Court has recalled above, the indication of provisional measures is only justified if there is urgency; whereas the Court, taking note of the assurances given by Senegal, finds that, the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order;"
International Court of Justice, 2009, p. 155, § 72.

did not find the proposed national measures satisfactory in the case of the San Juan river.[776]

Let us refer to Shabtai Rosenne's proposal to check also the solidity of the legal title among the preconditions[777], although, as a matter of fact, shortly after, in the last edition of his monumental book on the jurisprudence, he used a rather reserved formulation and apparently returned to the classical approach.[778]

Interim measures may be adopted in the preliminary phase as well as in the subsequent *in merito* phase, and they can be reevaluated by the organ having adopted them, whether full court or *ad hoc* chamber, when the parties to the litigation agreed to bring their case before the latter.

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776 "(...)The Court further takes note of the assurances of Nicaragua, as formulated by its Agent at the hearings in response to a question put by a Member of the Court, that it considers itself bound not to undertake activities likely to connect any of the two caños with the sea and to prevent any person or group of persons from doing so. However, the Court is not convinced that these instructions and assurances remove the imminent risk of irreparable prejudice, since, as Nicaragua recognized, persons under its jurisdiction have engaged in activities in the disputed territory, namely the construction of the two new caños, which are inconsistent with the Court's Order of 8 March 2011."
International Court of Justice, 2013, p. 366-367, § 50.

777 "In fact, a binding provisional measure requiring the respondent to take action very similar to what was requested in the original claim may have the effect of rendering the continuation of the proceedings redundant. (...) Provisional measures binding on the parties would seem to be more justified if the Court should be provisionally satisfied that the claimant State has a reasonable probability of success (as is required in some domestic legal systems), even though there may been element of hazardous guesswork in making such an assessment."
Melvin, Rosenne, 2003, p. 203.

778 „The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or a part of the claim formulated in the document instituting proceedings."
Rosenne in a footnote, refers to the position of the PCIJ, taken in the 'case of the Factory at Chorzów, Series A n°12 (1927), p. 10.' Rosenne, 2006, p. 1410.

### 2.2.2.

At the International Criminal Court, the *prima facie* jurisdictional competence has very rarely been used as a technical term[779] even in cases close to this judicial notion[780] and the situation is definitely much more complex than in the litigations before the ICJ.

The jurisdictional competence of the ICC is primarily based on the territorial link (*ratione loci*) or personal link (*ratione personae*): when a situation is referred by a state, it should indicate that the events occurred on the territory of a state-party or the alleged perpetrator is a citizen of a state-party.[781] (The referral can be (i) a self-referral i.e. the state sends a situation occurred on its own territory, but (ii) it may also refer a situation having occurred in another state-party.)

The Prosecutor has the right to refer a situation *proprio motu* to the Court pending that these territorial or personal connections seem to exist vis-à-vis a state-party. [782] If a situation is referred however by the Security Council, the existence of a *ratione loci* or *ratione personae* connection with a state-party in not required.[783] The *ratione temporis* principle should be observed, as well as that of the complementarity. The consideration of the eventual home prosecution and the observance of the *ne bis in idem* rule may require a rather lengthy analysis.

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779 See e.g. "Considering that Pre-Trial Chamber has *prima facie* jurisdiction (....)" but take into consideration that the French translation did not use it *expressis verbis*: "Attendu que de prime abord, la Chambre préliminaire I a compétence (....)" ICC-01/04-19-tFR 02-05-2005.
*Nota bene*: The expression "compétence *prima facie*" / "*prima facie* competence" (or "*prima facie* jurisdiction") is not used either in The Rome Statute or in the Rules of Procedure and Evidence.

780 It is not mentioned either in the recent "Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"" rendered in the context of the alleged deportation of Rohingyas from Myanmar to the territory of Bangladesh.
ICC-RoC46(3)-01/18-37 06-09-2018

781 See article 12 of the Rome Statute.

782 See article 15 of the Rome Statute.

783 See article 13 of the Rome Statute.

It would be easy to suggest reversing the formula saying that the judges may not pronounce on interim measures (*lato sensu*) until it is not evident *prima facie* that the ICC is competent in the matter. However, competence and admissibility are two different notions and even the *prima facie* competence over a situation is not enough to adopt an interim measure against an alleged perpetrator.

The adoption of interim measures presupposes some procedural decisions, taken typically by the Pre-Trial Chamber on the Prosecutor's demand, like e.g. to satisfy that jurisdiction is established and the observance of the rule *ne bis in idem* may reoccur in the form of "challenges to the jurisdiction of the Court or the admissibility of a case" under article 19. Some other types of interim measures (*lato sensu*[784] or only *stricto sensu*[785]) depend on different other preconditions and the logic of the investigations.

Beside urgency and necessity, the condition of "on an exceptional basis" is also evoked in the Rome Statute (see e.g. the "*unique investigative opportunity*"[786]).

In principle, the adoption of interim measures is sought by the Prosecutor, but there were examples where the accused's defence counsels did not want to cooperate (yet): Laurent Gbagbo's lawyer asked the Pre-Trial Chamber to prevent that the other counsel could also get access to some pieces of evidences that he had submitted.[787]

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784 See e.g.: as one of the preconditions of issuing an arrest warrant, in Article 58 §1 (a):
"There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (...)"

785 See e.g.: Article 57 (3) (e) of the Rome Statute:
"Where a warrant of arrest or a summons has been issued (...)"

786 Article 18 (6) of the Rome Statute:
"Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."
(See also Article 56 (1) of the Rome Statute).

787 "[i]l est nécessaire que la Chambre préliminaire prenne des mesures conservatoires afin que le Procureur ne divulgue aucun élément de preuve

(In the same case, a similar step was taken vis-à-vis the conflict of interest of the victims' representatives.[788]) It is to be noted that similarly to the logic of the rules of the ICJ (which is not really reflected in the practice) an interim measure of "*unique investigative opportunity*" may also be taken *ex officio*.[789]

These measures can be challenged before several fora of the ICC. According to their nature, these measures can be contested by reference to the termination of the urgency or the necessity before the organ which has adopted them, i.e. a Pre-Trial Chamber or a Trial Chamber[790], but some measures like a " *unique investigative opportunity* " taken *ex officio,* may be appealed.[791]

The onus of the proof is incumbent upon those who claim the interim measures, but as we have already mentioned, judges may also act *ex officio* without the prosecutor's submission.

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émanant de la défense à l'équipe de défense de Monsieur Blé Goudé. (...)"
ICC: The Prosecutor v. Laurent Gbagbo: Version publique expurgée du *corrigendum* de la demande d'autorisation d'interjeter appel de la décision de la Juge unique du 19 juin 2014 sur la "Prosecution's request to disclose material in a related proceeding pursuant to Regulation 42(2)" (ICC-02/11-01/11-659) ICC-02/11-01/11-660-Corr-Red p. 7, § 28.

788 Zago, 2014, p. 13.

789 Rome Statute, Article 56 (3) (a):
"Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative."

790 However, if a case is already before a Trial Chamber, this chamber might suspend the obligation of execution of an interim measure (*stricto sensu*) ordered still by the Pre-Trial Chamber, as it happened so in The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the implementation of the freeze of assets, ICC-01/09-02/11-931 Conf, Pursuant to Trial Chamber V(b)'s Order ICC-01/09-02/11-967, dated 21st October 2014, this document is reclassified as "Public", p. 15, § 29.

791 Rome Statute, Article 56 (3) (b):
"A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis."

## 2.3. The legal nature of interim measures before the ICJ and the ICC

### 3.2.1.

Due to the change in jurisprudential approach,[792] long expected by scholars,[793] manifested first in the case Bosnia-Herzégovina v. Serbia-Montenegro,[794] pronounced in a more explicit form in the LaGrand case[795]

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792 Henri Rolin recognized the ambiguity of article 41 but put emphasis on the interplay with article 94 of the UN Charter "qui n'attribue d'effets obligatoires qu'aux arrêts rendus par la Cour." Rolin, 1954, p. 485.;
Arbour, 1975, p. 535, 542, 570.;
On the basis of the old practice, the president Schwebel opined in 1994 that interim measures cannot oblige.
Schwebel, 1994, p. 9.

793 Guggenheim, 1932, pp. 678-679.;
Fitzmaurice, 1952, p. 22-23.;
Lauterpacht, 1958, p. 253-254.

794 "The Court (...) reaffirms the provisional measure indicated in paragraph 52 A (1) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented.";
ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Order of 13 September 1993, Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, p. 349, § 61.

795 "98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. (...), the Court is now called upon to rule expressly on this question. (...) 102. (...) It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."
LaGrand (Germany v. United States of America) Judgment of 27 June 2001, ICJ Reports 2001, p. 501 (§ 98) and p. 503 (§ 102).
As Dinah Shelton puts it: "the ICJ might have come to the same conclusion by referring to inherent judicial power but basing the decision on customary norms of treaty interpretation was a less controversial source for a controversial conclusion."
Shelton, 2009, p. 549.

and repeated and confirmed consequently[796] since then, the mandatory nature of the interim measures adopted by the ICJ can no longer be contested. The new jurisprudential approach[797] definitely helped the Court to strengthen its position and its judicial functions in international litigations.[798]

### 3.2.2.

Astonishing as it may seem, the legal nature of the interim measures adopted by the International Criminal Court depends on several factors like the chamber's will and the purpose of the measure to be taken. Typically, these are orders enjoying *ex lege* legal nature but as we have seen in the precited text of the Rome Statute on the *"unique investigative opportunity "*), the Pre-Trial Chamber may limit itself to the adoption of a simple recommendation.[799] See namely article 56(2) (a) and (e).

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On the links between inherent powers of international courts and interim measures, see also: Pierini, 2015, pp. 6 and 14.; Klamberg, 2017, p. 12.; Viljam Engström: Article 4(2)–The Court may exercise its functions and powers, as provided in this Statute... Available at: https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-1/#c3145 (Accessed: December 2019).

796 International Court of Justice, 2005, p. 258, § 263.;
International Court of Justice, 2011, p. 548, § 46 p. 554, § 67.;
International Court of Justice, 2013, p. 368, § 57.;
International Court of Justice, 2014, p. 160, § 53.;
International Court of Justice, 2016, p. 1171, § 97.;
International Court of Justice, 2017, p. 245, §. 50.;
International Court of Justice, 2018, § 77.;
International Court of Justice, 2018b, § 100.

797 As we have seen *supra*, the ICJ denies that a change in its jurisprudence occurred here (see our footnote n° 59).

798 "Dépasser une controverse doctrinale et de mettre un terme à une anomalie criante qui a empêché l'organe judiciaire principal des Nations Unies de s'acquitter pleinement de ses fonctions judiciaires."
Hammadi, 2001, p. 81.

799 Rome Statute, Article 56: Role of the Pre-Trial Chamber in relation to a unique investigative opportunity:
"2. The measures referred to in paragraph 1 (b) may include:
(a) Making *recommendations* or orders regarding procedures to be followed;

As far as the *stricto sensu* interim measures are concerned, the Pre-Trial Chamber- according to article 93 - also seeks the cooperation of states, in order to issue interim measures (article 57(3)(e)[800] calls this " protective measures "). The reference to article 93 implies the states' legal obligation.[801] The ICC interpreted the wording *"seek the cooperation of States / solliciter la coopération des Etats"* as an order which is binding the states because it used the terms " *to request the cooperation* ".[802]

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(b) Directing that a record be made of the proceedings;
(c) Appointing an expert to assist;
(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance, or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make *recommendations* or orders regarding the collection and preservation of evidence and the questioning of persons;
(f) Taking such other action as may be necessary to collect or preserve evidence."

800 Precited *supra*

801 Rome Statute, Article 93:
"Other forms of cooperation
1.States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions: (...)"
Statut de Rome, Article 93:
"Autres formes de coopération
1. Les États Parties font droit, conformément aux dispositions du présent chapitre et aux procédures prévues par leur législation nationale, aux demandes d'assistance de la Cour liées à une enquête ou à des poursuites et concernant: (...)"

802 "In sum, Articles 57(3)(e) and 93(1)(k) of the Statute and Rule 99(1) of the Rules confirm the authority of the Pre-Trial Chamber to take protective measures to identify, trace, freeze and seize property or assets of an accused person prior to the commencement of trial. Collectively, these provisions authorise the Pre-Trial Chamber, after the consideration of certain factors, to request cooperation from a State to implement such protective measures after the issuance of a warrant of arrest or a summons to appear and prior to the start of trial, both for the purposes of eventual forfeiture as an applicable penalty under Article 77(2)(b) of the Statute and for reparations under Article 75 of the Statute."

The arrest warrants are of course to be executed, i.e. their legal nature goes without saying: for these types of rulings, articles 86 and 87 show that they are mandatory on states[803] and at least at a scholarly level, it cannot be contested. The binding character was emphasized e.g. in the Saif Gaddafi[804] and Al Bashir[805] cases.

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The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931, 8 July 2014. p. 11, § 19.

803 Rome Statute, Article 86, General obligation to cooperate:
"States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."
Article 87, Requests for cooperation: general provisions:
"1. (a) The Court shall have the authority to make requests to States Parties for cooperation. (...)
7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

804 "Outstanding obligation to surrender Saif Al-Islam Gaddafi to the Court" Situation in Libya, in the case of The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the "Request for an immediate finding of non-compliance and referral to United Nations Security Council."
17 September 2013, ICC-01/11-01/11-446, p. 8, § 16.

805 "Uganda is a State Party to the Statute. It has an obligation to cooperate with the Court in accordance with Part 9 of the Statute, including with requests for arrest and surrender to the Court of persons against whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 of the Statute. (...) In the present case, and notwithstanding its obligations to cooperate with the Court, Uganda did not arrest Omar Al-Bashir while he was present on its territory and surrender him to the Court nor did it raise with the Court any problem it might have identified in the execution of such request. In fact, Uganda did not even respond to the note verbale transmitted by the Court on 11 May 2016."
The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09-267, 11 July 2016, § 9-10.

3.2.3.

The interim measures rendered up to now by the International Court of Justice were always public. At the International Criminal Court, these measures may be either public or confidential (even secret), and probably most of them belong to this latter category in order to preserve their efficacy which could be undermined by a prompt public disclosure. The execution of protective measures (e.g. the freeze of assets) can become much more difficult if the suspect knows which country is addressed by the ICC. For similar reasons, arrest warrants are generally issued in a " sealed " form and they do not become public (" unsealed ") until the arrested person is transferred to The Hague. It is also true that there were some arrest warrants which were public from the beginning (e.g. the one issued against Mr Al Bashir, the Sudanese president).

The same can be said about a considerable part of the measures of *"unique investigative opportunity* " like e.g. a witness statement collected during an ongoing open conflict and it goes without saying that the witnesses' and victims' protection could render it imperative to adopt measures securing that the identity of the witness or of the victim would not become accessible to those who have no right to know it. (However, as one of the articles of the Rome Statute states, these measures may not discredit the rights of the defence.[806])

3.2.4.

The interim measures taken by the International Court of Justice are not necessarily the same as those which were asked for by the given party.

As the ICJ put it in Préah Vihéar 2 " Whereas the Court has considered the terms of the provisional measures requested by Cambodia; whereas it does not find, in the circumstances of the case, that

806 Rome Statute: Article 56 (1) (b):
"In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence."

the measures to be indicated must be the same as or limited to those sought by Cambodia;"[807] One may ask whether this statement should also be understood as a promise to go forward when the party to the litigation seems to be too reluctant to take the right or more appropriate step?

In the San Juan river litigation, however, the Court was much more reserved[808] and interpreted its competences rather in the cascade of successive interim measures. Moreover, even if it ordered – according to Costa Rica's demand - that the new bed excavated should be refilled, it imposed that obligation on Nicaragua, without mandating Costa Rica to do it alone,[809] what this latter country wanted to hear.[810] The right to act alone was recognized exclusively to Nicaragua and only in a very limited manner. [811]

In one of the cases related to the Convention against Racial Discrimination, the ICJ prescribed such interim measures which serve the interests of peace and peaceful settlement of disputes and which

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807 International Court of Justice, 2011, p. 552, § 60.;
(Similarly: International Court of Justice, 2014, p. 159, § 49.;
International Court of Justice, 2017, p. 126, §63.;
International Court of Justice, 2018, § 73.

808 "The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. (...)"
International Court of Justice, 2013, p. 367, § 52.

809 "Nicaragua shall fill the trench on the beach north of the eastern caño within two weeks from the date of the present Order";
International Court of Justice, 2013, p. 369 § 59, B.

810 "The third provisional measure sought by Costa Rica is aimed at ensuring that Costa Rica be permitted to undertake remediation works in the disputed territory on the two new caños and the surrounding areas, to the extent necessary to prevent irreparable prejudice being caused to the disputed territory."
International Court of Justice, 2013, p. 361 § 32.

811 "Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new caños, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River."
International Court of Justice, 2013, p. 370 § 59, E.

are addressed to both parties[812] and not only one, as originally requested. [813]

At the International Criminal Court – as we have seen – the Rome Statute set up a counterbalance to the Prosecutor which enables the Pre-Trial Chamber to say freely that it does not feel necessary all the measures which are claimed or suggested by the Prosecutor. We have also seen above [814] that even in the absence of a request submitted by the Prosecutor, the Pre-Trial Chamber is mandated to impose special types of interim measures in the context of a "*unique investigative opportunity*". Such a step should always be preceded by a consultation with the Prosecutor and may be appealed by the Prosecutor. It is plainly clear from the text of the Rome Statute[815] that this *proprio motu* step could serve rather the defence's interests.[816]

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812 ICJ: "The Court recalls that Qatar has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the UAE. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (...). In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute."
International Court of Justice, 2018, § 76.;
Similarly: International Court of Justice, 2018b, § 99.

813 That part of the original Qatari claim was the following:
"the UAE shall abstain from any measure that might aggravate, extend, or make more difficult resolution of this dispute"
International Court of Justice, 2018, § 15 (b).
The relevant part of the request submitted by Tehran in the Iran vs. USA litigation was as follows:
"That the USA shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions, and refrain from imposing or threatening announced further sanctions and measures which might aggravate or extend the dispute submitted to the Court"
International Court of Justice, 2018b, § 5 (a).

814 See Article 56 (3) of the Rome Statute.

815 "(...) the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial (...)" *loc. cit.*

816 See also: Schabas, 2016, p. 875.

However, the practice so far has rather shown that the Pre-Trial Chambers approve, partially approve or disapprove of the elements of the request. In fact, there has apparently been no "precedent" for such interim measures taken by the judges which were not originally mentioned in the Prosecutor's request or which could not be considered as an alternative or a attenuated form of the claimed measure. Such a measure would not forcibly be incompatible with the text of the Rome Statute[817] but it would probably run against the well-established penal law philosophy behind the institution of the "*juge d'instruction*", who controls but does not take part actively in the investigations as such.

As far as interim measures *lato sensu* are concerned, the Pre-Trial Chamber or a Trial Chamber may take measures which are different from those asked for (e.g. a summons to appear instead of an arrest warrant[818] if the arrest is not felt necessary or if it opines that in case

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817 See Article 56 (1)(b) of the Rome Statute: Role of the Pre-Trial Chamber in relation to a unique investigative:
opportunity "In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and in particular to protect the rights of the defence.";
See also Article 56 (2) f: "Taking such other action as may be necessary to collect or preserve evidence."

818 See Article 57 (3) of the Rome Statute pointing out that:
"In addition to its other functions under this Statute, the Pre-Trial Chamber may:
(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation; required for the purposes of an investigation;"
Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear:
"1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
(b) The arrest of the person appears necessary:
(i) To ensure the person's appearance at trial;
(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

of a witness or a victim, lighter (or on the contrary, stronger) measures are adequate in the light of the specific circumstances of a given situation. The Prosecutor may request alternative measures[819], even if, in principle, her choice is limited to the two measures from which the one more suited in the particular circumstances should be picked. [820] The practice shows that a summons to appear can be revised even *proprio motu*, if it proves to be inefficient. [821] Apparently, given the Prosecutor's activity, the different chambers do not really need to rely upon their *proprio motu* competence.

Interim measures *stricto sensu* (the freeze and forfeiture of assets) covered in Article 57 (3) (e) – which means *per se* "a specific and high threshold" as Ambos puts it[822] - are not linked in the text *expressis verbis* to the Prosecutor's initiative. Nevertheless, it is plainly evident that in most of the cases, the Chamber is alerted by the Prosecutor and/or the representatives of the victims[823] to the

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(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances."

819 "1. Noting the "Prosecutor's Application under article 58" (the "Application"),1 filed on 20 November 2008 pursuant to article 58 of the Statute of the Court in the investigation of the Situation in Darfur, Sudan, whereby it requested the Chamber to issue warrants of arrest or, alternatively, summonses to appear for Bahr Idriss Abu Garda ("Abu Garda"), [REDACTED], on a confidential and *ex parte* basis;"
The Prosecutor v. Bahr Idriss Abu Garda, Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-1, 07 May 2009, 3/22 SL PT, p. 3.

820 See: Hall, Ryngaert, 2016, p. 1455.

821 "32. The Chamber reserves its right to review this finding either *proprio motu* or at the request of the Prosecutor, however, particularly if the suspect fails to appear on the date specified in the summons or fails to comply with the orders contained in the summons to appear issued by the Chamber."
The Prosecutor v. Bahr Idriss Abu Garda, Decision on the Prosecutor's Application under Article 58, ICC-02/05-02/09-1, 07 May 2009, 3/22 SL PT, p. 15, § 32.

822 Ambos puts an emphasis on "a specific and high threshold" because Article 57 (3) (e) contains also:"and having due regard to the strength of the evidence" Ambos, 2016, p. 395.

823 See e.g.: "The victims' institutionalized representation *via* Office of Public Counsel for Victims (OPCV)." It is to be noted that Guariglia et Hochmayr

necessity[824] of such a measure. The Chamber may also act *ex officio* [825] and there are concrete examples on that. [826] The rendered and the required measures may be different, and this could be explained *inter alia* by recognizing that the proposed measure is not conform to the accused's personal circumstances[827] or by the hypothesis that the

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contest this capacity in this phase of the procedure. Guariglia, Hochmayr, 2016b, p. 1436.

824 Kentsa, 2016, p. 69.

825 This is clarified in the rule 99 (1) in the Rules of Procedure and evidences: "The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article
75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested."

826 "For these reasons, the single judge hereby orders the Registrar to prepare and transmit, in accordance with article 87(2) of the Statute and rule 176(2) of the Rules and in consultation with the Prosecutor, a request for cooperation to the competent authorities of the Republic of Kenya for purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, without prejudice to the rights of bona fide third parties."
Decision Ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali. ICC-01/09-02/11-42, p. 5.
*Nota bene*: "*in consultation with*" and not "*on the application of*". On page 3, §, single judge Trendafilova precises that "[o]n 21 March 2011, the Single Judge issued the "Decision Requesting Information and Observations from the Prosecutor" (the "21 March 2011 Decision"), in which she requested the Prosecutor to submit "observations and any information in his possession concerning the nature and whereabouts of the financial assets and properties belonging to or under the control of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali". The use of the "she" proves that the initiative came from the single judge.

827 "(...) an order for protective measures for the purpose of reparations should be appropriately tailored to the circumstances, including consideration of the claims of victims and the personnel circumstances of the accused, as appropriate."
The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931, 8 July 2014. p. 10, § 17.

Chamber realizes that the required measure is already duly covered by a mandatory resolution passed by the Security Council.[828].

## 2.4. Who are the intended recipients of the interim measures?

At the International Court of Justice, these are only the parties and nobody else.

By proclaiming this *dictum*, the ICJ could avoid to pass a decision on the delicate issue of the arms embargo imposed by the Security Council during the Balkan conflict, which affected much more heavily the official government of Bosnia-Herzegovina than the rebels of Karadzic and Mladic, who were already duly armed with heavy weapons coming mostly from the Yugoslav army. When Sarajevo asked the judges to order the unilateral lift of the embargo, thus exempting Bosnia-Herzegovina[829], the Court replied that it lacked competence to do so in the form of interim measures. [830]

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828 Let's think on situations where the Security Council has already ordered the freeze of assets of persons falling under sanctions, pronounced "according to Chapter VII" of the UN Charter.

829 "Whereas on the basis of the facts alleged in the Application Bosnia-Herzegovina requests the Court to adjudge and declare as follows: (...) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law ;" (...)"that Security Council resolution 713 (199 1) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of ultra vires." International Court of Justice, 1993b, p. 328, § 2 (m) and (o).

830 "(...) whereas however it is clear that the intention of the Applicant in requesting these measures is not that the Court indicate that the Respondent ought to take certain steps for the presentation of the Applicant's rights, but rather that the Court make a declaration of what those rights are, which "would clarify the legal situation for the entire international community", in particular the members of the United Nations Security Council; whereas accordingly this request must be regarded as outside the scope of Article 41 of the Statute." International Court of Justice, 1993b, p. 345, § 41.

At the International Criminal Court, the circle of recipients is much larger, and it depends first and foremost on the given measure. The intended recipients of the measures having the vocation to protect the witnesses are the given persons (and eventually their family, too) and the states participating in the operation. In case of an arrest warrant or a summons to appear, this is the suspect (who is not forcibly aware of the existence of the arrest warrant and is certainly not if it is issued under seal). Within the institutional framework of the ICC, the State(s) where the arrest has chances (in case of an arrest warrant) and the suspect (in case of a summons to appear) have to be informed by the Registry.

When a " unique investigative opportunity " is the object of a measure, the addressee can be a State, an attorney at law, an expert or even one of the judges of the ICC[831]. The suspect (if arrested or if complying with the summons) is in principle informed of the fact that such a request has been submitted.[832]

When interim measures *stricto sensu* are concerned, it is again the Registry's duty to transmit the Chamber's order to the given State(s) where the suspect allegedly or presumably disposes assets or important properties whether mobile or immobile. This State can be the State according to the suspect's citizenship or to his/her domicile[833] but also whatever other country whose banks or financial institutions

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831 Rome Statute, Article 56 (2) (e): "Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons".

832 Rome Statute, Article 56, (1), (c): "Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter."
As commentators put it, a negative decision could be taken only in "extremely exceptional circumstances" Guariglia, Hochmayr, 2016b, p. 1416.

833 Decision ordering the Registrar to Prepare and Transmit a Request for Cooperation to the Republic of Kenya for the Purpose of Securing the Identification, Tracing and Freezing or Seizure of Property and Assets of Francis Kirini Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali, 5 April 2011, ICC-01/09-02/11-42-Conf. (Reclassifié public le 21 Octobre 2014).

are taking care of the suspect's deposits, assets or shares.[834] In order to avoid undermining its efficacy, such a decision is not public, and this status is preserved in principle till its execution. (Or at least this is the conclusion to be drawn from the few examples.)

## 2.5. The end of interim measures

At the International Court of Justice, an interim measure is not automatically ceased even in case of a proper execution: the Court has to pass a formal decision on it. It is very interesting to see that for the sake of legal security, the ICJ paid great attention to this condition even in a case where it concluded later that it was not competent in the matter.[835]

When adjudging *in merito* the legal dispute, the Court should check whether the pronounced interim measure has such elements which, either in their original or in a modified form, could also be transposed into the final decision. This seems to be logical especially in environmental disputes.

The ICJ has the right, however, to modify[836] an interim measure by enlarging or by diminishing its scope.[837]

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834 "(...) Par ces motifs, la Chambre a) demande à la République portugaise de prendre, conformément aux procédures prévues par sa législation nationale, toutes les mesures nécessaires afin d'identifier, localiser, geler ou saisir les biens et avoirs de M. Jean-Pierre Bemba Gombo qui se trouvent sur son territoire, y compris ses biens meubles ou immeubles, ses comptes bancaires ou ses parts sociales, sous réserve des droits des tiers de bonne foi".
Le procureur c. Jean-Pierre Bemba Gombo, Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise. ICC-01/05-01/08-8-US-Exp (reclassifié public, le 14 novembre 2008), p. 4. (No English text was issued.).

835 "The Court in its Order of 15 October 2008 indicated certain provisional measures. This Order ceases to be operative upon the delivery of this Judgment. The parties are under a duty to comply with their obligations under CERD of which they were reminded in that Order".
International Court of Justice, 2011b, p. 140, §186.

836 Rules of the ICJ: Article 76 (1): "At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification".

837 "The Court recalls that the above-mentioned measures were required because of Australia's refusal to return the documents and data seized and detained by

At the International Criminal Court, the answer depends mostly on the nature of the given interim measures. Some of them cease to exist directly after their execution (e.g. in case of an arrest warrant: arrest and transfer to The Hague) and the detention depends on other measures to be taken.

A " *unique investigative opportunity* " is terminated with its execution: the witness's testimony is registered, the autopsy is done, etc. The interim measures *stricto sensu* may have a longer, continuous legal life, and the freeze or forfeiture are to be observed until another decision is taken, whether aiming the suspension or a final lifting.[838] Similarly, witness protecting measures also enjoy a permanent or at least a long term legal character which is ceased only after an opposite decision has been taken by the Court.

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its agents. It observes that, in its letter of 25 March 2015,
Australia has now notified the Court of its intention to return the documents and data in question. The Court further notes that, in its written observations, Timor-Leste raises no objections to this course of action or to the corresponding provisional measures being modified accordingly. In view of Australia's change in position regarding the return of the documents and data, the Court is of the opinion, that there has been a change in the situation that gave rise to the measures indicated in its Order of 3 March 2014." (...) „In view of the foregoing, and in reaching its decision on Australia's request, the Court takes the view that the change in situation is such as to justify a modification of the Order of 3 March 2014." (...) „The modification resulting from the present Order is without effect on the measures indicated in points 1 and 3 of the operative part of the Order of 3 March 2014 (...), which will continue to have effect until the conclusion of the present proceedings, or until further decision of the Court". International Court of Justice, 2015, pp. 559-560, §§ 14 et 18-19.

838 "Nevertheless, given the Prosecution's acknowledgement that it 'now has insufficient evidence to secure a conviction at trial', (...) that any information provided 'mayor may not yield evidence relevant to this case' (...), and the directive contained in Article 57(3)(e) of the Statute that the Chamber pay due regard to the strength of the evidence and the rights of the parties concerned, the Chamber considers it would not be appropriate at this stage of the proceedings to seek execution of the Pre-Trial Chamber's Order. Mindful, however, that the current limited period of adjournment in this case may enable necessary evidence to be obtained 'potentially shedding light on matters central to the charges' (...) the Majority suspends the Pre-Trial Chamber's order until further notice".
The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the implementation of the request to freeze assets, ICC-01/09-02/11-931, 8 July 2014. p. 15, § 29.

## 2.6. The efficacy of interim measures

Since the beginning of their existence, the real effect of the decisions of the Permanent Court of International Justice and the International Court of Justice has always been considered as depending mostly on the will of the States participating in the litigation. If a case is deferred by special agreement to The Hague, the judgments are executed – with the notable and *quasi* single exception of the Gabčikovo-Nagymaros case[839] - even if sometimes with a considerable delay or after unsuccessful efforts to "appeal" it, disguising the State's unwillingness as a request for interpretation or for revision.

The joint will of States to have their dispute settled by the judiciary of the Peace Palace covers normally all the procedural stages of the case. (Let's note however that the special agreement contracted by Hungary and Slovakia in the Gabčikovo-Nagymaros case qualified the unilateral recourse to interim measures as triggering the termination of the agreement. [840] )

If the case is submitted to the ICJ unilaterally and based on special dispute settlement dispositions of some treaties and conventions or on declarations recognizing the jurisdiction of the Court as compulsory but the other party contests the existence of jurisdiction *in concreto*,

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839 Gabčíkovo-Nagymaros Project (Hungary/Slovakia): the special agreement was signed on the 7th of April 1993, submitted to the Court on the 2nd of July 1993 and the Court delivered its judgment on the 25th of September 1997. (The judgment has not been executed and in 2018, this is the oldest one at the list of the Court.)

840 "Article 4:
(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management regime for the Danube.
(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.
(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement."
See the text in: International Court of Justice, 1997, p. 12.

the consequence if often that the State addressed by the interim measure does not execute it or does it only partially. This happened in the Tehran hostage case, Bosnia-Herzegovina v. Serbia-Montenegro case, LaGrand case, etc.

More of a school hypothesis than a true reality, the institution of a *forum prorogatum* can hardly lead to examples on interim measures.[841]

Consequently, we may recall the old teaching saying that more a case is political (or politicized), more difficult the execution of an international judicial decision will be. This is especially true when interim measures are concerned. [842]

The overall situation has only very slightly or not at all improved since the alert voiced by Jean-Maurice Arbour[843] and as Sorel put rightly, an interim measure is a risky act of judges[844], which, according to Guillaume Le Floch, are nearly never respected.[845].

As to the International Criminal Court, the time elapsed since the opening of the doors in 2002 seems to be long enough to state that the efficacy of the interim measures is also multidimensional. Similar to the practice of the ICJ, easy and technical type of the interim

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841 In the quasi only relevant litigation, i.e. the Corfu Channel case, (United Kingdom of Great Britain and Northern Ireland v. Albania), neither of the adopted six orders (1947-1949) imposed interim measures.

842 "International court of justice orders US to lift new Iran sanctions - Mike Pompeo indicates US will ignore ruling, after judges in The Hague find unanimously in favour of Iran" (The Guardian, 3rd of October, 2018) Available at: https://www.theguardian.com/world/2018/oct/03/international-court-of-justice-orders-us-to-lift-new-iran-sanctions (Accessed: March 2019)

843 „L'irrespect, par les Etats, des ordonnances portant indication de mesures conservatoires est, en soi, un phénomène troublant et sérieux que l'on ne saurait passer sous silence, tellement néfastes nous paraissent être les retombées au niveau plus général de la solution pacifique des différends internationaux. C'est là autant de discrédit jeté à l'autorité et à l'efficacité de la juridiction de La Haye."
Arbour, 1975, p. 534.

844 „[t]oute décision dans ce cadre est une forme de „prise de risque" et (...) [i]l en résultera une légitimité renforcée ou au contraire, amoindrie de la juridiction selon l'adéquation entre le résultat escompté et celui obtenu." Sorel, 2003, p. 54.

845 [Les] "mesures conservatoires indiquées par la CIJ ne sont presque jamais respectées."
Le Floch, 2008, p. 222-223.

measures are the least difficult to implement (see e.g. " *unique investigative opportunity* ").

The number of interim measures *lato sensu* is exceptionally high. 2736 were delivered [846] before June 2010 and they were mostly executed (interim measures *stricto sensu*[847] included), with the well-known exception of several arrest warrants. [848] It is to be noted however, that *no legal problem* emerged with the execution of arrest warrants against Dominic Ongwen (Uganda), Bosco Ntaganda, Jean-Pierre Bemba Gombo (Democratic Republic of Congo), Al Faqi Al Mahdi, Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Mali), Alfred Yekatom or Patrice-Edouard Ngaïssona (Central African Republic).

It cannot be denied however that even Ongwen[849] and Ntaganda[850] were arrested only years after the issue of the warrants.

The reasons underlying the non-execution of several arrest warrants originate on the one hand in the lack of ability, but sometimes in the manifest lack of willingness and these two factors may also be combined.

The execution and non-execution of arrest warrants depend largely on several factors and namely the following ones:

Was the ICC seized by a self-referral?

If it was, the cooperation with the state-authorities is in principle granted, even if on the sport, in an uncertain political climate and in

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846 Ba, 2010, p. 48.

847 Ba: *op. cit* p. 52. (Ba adds in his note n°147 (p. 179)
("Sans que l'on puisse donner un pourcentage sur l'état de l'exécution, notamment des réponses données par les États, puisque celles sont en général confidentielles, mais les avoirs des personnes visées sont bloqués à la demande de la Cour.")

848 "La CPI dépend donc totalement de la coopération des Etats et il va sans dire que seuls les Etats Parties ont l'obligation de coopérer avec la Cour. Les conséquences sont bien entendue dramatiques pour la Cour (...) Pour la première décennie d'activité de la CPI, on compte à ce jour 14 mandats d'arrêt décernés contre 13 personnes qui n'ont pas été exécutés."
Bitti, 2016, p. 896-897.

849 It is to be noted that the original arrest warrant was issued against Mr Ongwen yet in 2005, but he became effectively arrested only in 2015, after his surrender in which some Central-African militias and US services played an important role.

850 Similarly, the arrest warrant issued in 2006, and Mr Ntaganda was arrested in 2013 after his surrender to US Embassy in Kigali (Rwanda).

the presence of strongly armed anti-governmental forces, the full implementation of the obligations can be strongly hindered.

When the ICC is requested to act by the Security Council or by a referral submitted *proprio motu* by the Prosecutor, the experiences show considerable difficulties when interim measures should be implemented by the State whose (often very high ranking) citizens are targeted or when citizens of other States, and especially of non-States-Parties seem to be involved.

We shall see in the future whether interim measures delivered in procedures initiated by state-referrals concerning another State-party[851] will meet similar difficulties. (According to the Rome Statute, the cooperation of the authorities of this situation-State is mandatory.)

At the same time and according to the particularities of the cases, it could happen easily that a part of the interim measures presupposes actions to be implemented in another State than the so called "situation State". If the former is a State-Party to the Rome Statute, it is duty bound to cooperate, however if this State is not a State-Party, its cooperation should be secured by a special agreement. Sometimes, this is easy, sometimes it is not.

The higher the Prosecutor is targeting with her bow and arrows, the higher the reluctance of a State can be. This is however less pertinent when the given person is already an " ex ", a former head of state. Subregional solidarity apparently might also influence the spirit of cooperation of other states with the ICC.

These are the Security Council of the UN and the Assembly of States Parties who are mandated to act in case of the lack of implementation of an obligation of the Rome Statute.[852] It is well known

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851 On 27 September 2018, the Prosecutor received a referral from Argentina, Canada, Chile, Colombia, Paraguay and Peru (the "referring States"), regarding the situation in Venezuela since 12 February 2014.
International Criminal Court, 2018k.

852 Rome Statute, Article 87:
"(7) Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."

however that up to now, the efforts of the ICC aiming to make the Security Council impose a genuine sanction against States for non-cooperation have not been crowned with success.[853]

Needless to say that the specialists of geopolitics are better placed to find a proper answer to that than judges and lawyers.

## 3. CONCLUSIONS

Interim measures apparently are partly different, partly similar at the ICJ and the ICC. This remark concerns their nature, their form, their respective modalities and their efficacy. The situation is far from being tragic, but we are equally far from the optimum. As the fox told Saint-Exupéry's Little Prince: Nothing is perfect....

The institutional and procedural realm of the ICJ and the ICC has similar virtues and similar weaknesses: this can also be seen in the case of interim measures.

International lawyers are strongly familiar with the inherent limits of their favourite subject: international law is as efficient as States would like to see it.[854] However, mankind has witnessed numerous historical and contemporary examples for the awakening of States, recognizing the need to grant more and direct influence to the values of international law.

The International Court of Justice and the International Criminal Court exercise their respective powers within the framework of their statutory norms. The judges' creative jurisprudence and the *Réalpolitik* of the States result in concrete achievements and contribute to the stabilisation and the improvement of the inherited situation and the enlargement of the "Rule of Law" in international relations.

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853 "Certains s'étonnent d'ailleurs qu'au niveau du Conseil de Sécurité, aucune mesure, même hautement symbolique, n'ait été prise pour rappeler l'existence du mandat d'arrêt."
Blaise, 2011, pp. 420-444, § 54.

854 ""La banalisation" des mesures coercitives, qu'elle soient prises par le Conseil de Sécurité, ou par une juridiction internationale est aujourd'hui un fait."
Ghantous, 2013, p. 91.

# CHAPTER VIII

# Jurisprudential Interactions in the first Judgments of the International Criminal Court[855]

## 1. INTRODUCTION

International tribunals are autonomous according to their statutes and other international legal texts. Nevertheless, their interactions, i.e. the borrowing of thoughts and sentences from other international tribunals are a well-known phenomenon and the observation of the copyright rules is not a purely ethical or deontological issue in their case but the symbol of openness on the one hand and subject to traditions, an eventual aristocratism or the perception of identity on the other. Some years ago, I analysed[856] this phenomenon focusing on the practice of the International Court of Justice, the European Court of Human Rights, the Inter-American Courts of Human Rights, the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda and the International Tribunal for the Law of the Sea.

When writing this article in 2014, I had the ambition to contribute to the already launched analysis in the community of international

855 The content of his chapter was originally published in the 'Iustum, Aequum, Salutare (X)(1) 2014, pp. 97–110.' It was prepared as hand-out element of the 'professional presentation' , distributed during my campaign for the seat of a judge in 2014. When inserting in the book, I did not want to alter *in merito* or to actualize its content.
I thank the rector Rev. Mons Géza Kuminetz and the editor András Koltay for their consent to the republishing.

856 Kovács, 2003, pp. 461–489.; Kovács, 2003b, pp. 269–341.

lawyers[857] by showing how jurisprudential interactions appear in the first judgments of the International Criminal Court, i.e. in the Lubanga case[858] both in the judgment on criminal responsibility (in other terms: Article 74 Decision)[859] and in the decision on sentence[860]. The judgment[861] is much longer, cca. 593 pages, contrary to the 40 pages of the sentence[862].

The references generally come on *propriu motu*, but often the prosecution or the defence also evoke "precedents" of other international tribunals, namely on behalf of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, but most often the International Criminal Tribunal for the former Yugoslavia. There are some references also to the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

If we go into the details, we can distinguish between several types of references. On the one hand, the references can be used by the Pre-Trial Chambers, the Trial Chambers and Appeals Chambers.

In the Lubanga case, there are references in the judgment but also in the sentence as well as in the dissenting opinions of Trial Chamber I, consisting of Presiding Judge Adrian Fulford and judges Elizabeth Odio Benito and René Blattmann.

Another differentiating factor could be the nature of the reference: whether it is (i) only the pure summary of the position of the prosecutor or the defence, or (ii) the Court expresses its view over the cited

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857 See e.g.: Cole, Askin, 2012.; Kammer, 2012.; De Vos, 2011.; Drumbl, 2012.; Buisman, 2013.

858 Prosecutor v. Thomas Lubanga Dyilo (ICC -01/04-01/06).

859 The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 14-03-2012, International Criminal Court, 2012a. (In the followings: ICC, Lubanga, judgment).

860 Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute,
10/07/2012, ICC-01/04-01/06-2901, International Criminal Court, 2012c. (In the Foollowings: ICC , Lubanga sentence).

861 The Separate Opinion of Judge Fulford and the Separate and Dissenting Opinion of Judge Odio Benito added thereto another 30 pages.

862 Plus the 12 page Dissenting Opinion of Judge Odio Benito.

cases, or (iii) the Court evokes the "precedents" *proprio motu*, without any impetus emanating from the defence or the prosecutor.

We can also examine which judgments by which institution and how often they are referred to?

## 2. THE LUBANGA JUDGMENT AND THE INTERACTIONS

### 2.1. The references to the International Court of Justice

In the conclusions of Trial Chamber I on the characterisation of the armed conflict (international armed conflict vs. non-international armed conflict), the ICJ is referred to twice, namely i) the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*[863] and ii) *Armed Activities on the Territory of the Congo.*[864]

### 2.2. The references to the European Court of Human Rights

The jurisprudence of the European Court of Human Rights was evoked by the defence in the context of the *nullum crimen sine lege* (understood also as expecting the clear definition of the crimes) with reference to two cases namely *Veeber v. Estonia* and *Pessino v. France.*[865] The underlying issue was whether the ICC rules on the prohibition of enrolement of children in the army duly take two situations into account, namely when (i) children are enlisted as warriors ("using

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863 International Court of Justice, 1986c, § 219.; ICC, Lubanga judgment, footnote 1644, p. 246.
"'The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to noninternational conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict."

864 International Court of Justice, 2005.; ICC, Lubanga judgment, footnote 1651, p. 248.

865 European Court of Human Rights, 2003, § 31.; European Court of Human Rights, 2007, § 35.; ICC, Lubanga judgment, footnote 1733, p. 266.

them to participate actively in hostilities") and (ii) children who are "only" within the army units but without weapons or any military purpose or duty. Hereby, the defence referred also to the jurisprudence of the ICTY and that of the SCSL.

The International Criminal Court did not challenge the reference to the ECHR jurisprudence on *nullum crimen sine lege*, but after a lengthy analysis, based partly on the preparatory works (*travaux préparatoires*) of the statute, partly on the applicability of the jurisprudence of the SCSL in the matter concluded that there is no real problem in the understanding of the formula "using them to participate actively in hostilities"[866].

## 2.3. The references to the International Criminal Tribunal for the former Yugoslavia

The references to the cases adjudged by the International Criminal Tribunal for the former Yugoslavia are numerous, due also to the prosecution and the defence as well as to Trial Chamber I. The prosecution used the ICTY cases in order to clarify the non-international character of the armed conflict[867] despite of the fact the Ugandan army

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866 "The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis."
ICC, Lubanga judgment, § 628, p. 285–286.

867 ICC, Lubanga judgment, § 506, p. 232.

was also present during the course of the events on the Congolese territory. Here, the prosecution did not want to follow the Pre-Trial Chamber[868] and it based its position *inter alia* on the "overall control test" of the ICTY.[869]

Trial Chamber I confirmed the prosecution's position and remarked that "[t]he definition of this concept has been considered by other international tribunals and the Chamber has derived assistance from the jurisprudence of the ICTY."[870] Then, it cited the Tadić Interlocutory Appeal Decision[871] and later it turned again to this case quoted also by the Pre-Trial Chamber[872] and affirmed that "[t]he Trial Chamber agrees with this approach".[873] (There is also a remark in the given footnote that the defence had misunderstood the Pre-Trial Chamber 's position.)

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868 "The prosecution submits the conflict was non-international in character, notwithstanding the conclusion of the Pre-Trial Chamber that it was international until Uganda withdrew from Ituri on 2 June 2003."
ICC, Lubanga judgment, § 509, p. 233.

869 ICC, Lubanga judgment, § 511, p. 234.

870 ICC, Lubanga judgment, § 533, p. 242.

871 "[...] an armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".
( ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Interlocutory Appeal Decision", § 70). See: ICC, Lubanga judgment, footnote 1629, p. 242.

872 "The involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character." ( ICC-01/04-01/06-803-tEN, § 233) ICC, Lubanga judgment, § 535, p. 243.

873 ICC, Lubanga judgment, § 536, p. 243.

Some ICTY-cases[874] were also evoked in the context of the perception of the intensity of the conflict as a constituent element of the non-international armed conflict. The ICTY cited the classic Geneva distinction to be made between armed conflict and riots[875] but its explanation was also partly inspired by the text of Geneva Additional Protocol II and apparently by the practice of the United Nations as well: "the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, if so, whether any resolutions on the matter have been passed."[876]

The pertinent paragraph of the judgment ends by confirming that "[t]he Trial Chamber is of the view that this is an appropriate approach."[877]

Trial Chamber I also followed the ICTY jurisprudential line declaring that "[t]he Chamber endorses this view and accepts that international and non-international conflicts may coexist."[878] (In the last

874 ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, § 90.; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgment, 3 April 2008, § 60.; ICTY, *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Trial Chamber, Judgment, 10 July 2008, § 199-203.; See ICC, Lubanga judgment, footnote 1637, p. 244.

875 "[...] used solely as a way to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."
ICTY, *Prosecutor v. Dorneviċ*, Case No. IT-05-87/1-T, Trial Chamber I, Public Judgment with Confidential Annex – Volume I of II, 23 February 2011, § 1522.
ICC, Lubanga judgment, § 538 p. 244–245.

876 ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, § 407. See ICC, Lubanga judgment, footnote 1639, p. 245.

877 ICC, Lubanga judgment, § 538, p. 245.

878 *Tadić* Interlocutory Appeal Decision, § 96–98 and § 119.
The Chamber addressed the emerging issue of a blurred legal differentiation between international and non-international armed conflicts. The Chamber indicated that "it is only natural that the aforementioned dichotomy should gradually lose its weight." *Tadić* Interlocutory Appeal Decision, § 72–77.;

footnote, the Nicaragua case of the ICJ is also referred to, as mentioned *supra*.)

Another issue the interpretation of which was backed by the ICTY jurisprudence is the notion of the international armed conflict, which is not defined by the Rome Statute. In order to clarify – if needed – this expression, the Pre-Trial Chamber relied on the Tadić Appeals Judgment[879] and apparently, Trial Chamber I consented.[880] Soon after, there was another short reference to the ICTY[881] in the context of scholars' scientific writings and then, Trial Chamber I concluded that it could apply the test of the „overall control". For the assessment of the required degree, Trial Chamber I cited the ICTY affirming that a state is in this position when it "has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group."[882] Pre-Trial Chamber adopted this approach, as Trial

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ICTY, *Prosecutor v. Tadić, Case No. IT-94-1-A*, Appeals Chamber, Appeals Judgment, 15 July 1999 ("*Tadić* Appeal Judgment"), § 84.; See ICC, Lubanga judgment, footnotes 1642-1644, p. 245–246.

879 ICC-01/04-01/06-803-tEN, § 209.

880 An armed conflict is international „if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition an internal armed conflict that breaks out on the territory of a State may become international – or depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."
The citation is from the *Tadić Interlocutory Appeal Decision*, § 70 (cited above) and the footnote adds also ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, § 183 and ICTY, *Prosecutor v. Brnanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, § 122.;
See ICC, Lubanga judgment, § 541, p. 247 with footnote 1645.

881 *Tadić Appeal Judgment*, § 84, 90, 131, and 137–145.; See ICC, Lubanga judgment, with footnote 1646, p. 247.

882 Lubanga judgment, § 541, p. 248 with footnote 1649 evoking the ICTY cases as follows: *Tadić Appeal Judgment*, § 137 (emphasis in the original); see also: "[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere

Chamber I noted[883] and a bit further, it remarked that Pre-Trial Chamber had put special emphasis on the military occupation factor of the international armed conflict.

Apparently, Trial Chamber I felt the necessity of a deeper analysis but finally consented to the above dictum because after the comparision of the text of the Statute with the Elements of Crimes, the Geneva Conventions, the first Additional Protocol of 1977, and the *supra* referred ICJ Case of Armed Activities on the Territory of the Congo, it concluded "that for the purposes of Article 8(2)(b)(xxvi) of the Statute, an 'international armed conflict' includes a military occupation."[884]

Following the defence, Trial Chamber I mentioned another abstract reference to the ICTY – together with the ICTR-jurisprudence.[885]

A number of references are due to the defence's critics concerning a position taken by the Pre-Trial Chamber in the subjective component of the crime, ie. the *mens rea* which is established if the accused "is aware of the risk that the objective elements of the crime may result from his or her actions or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it [also known

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provision of financial assistance or military equipment or training)." (ibid., § 137, emphasis in the original).
See also, ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Appeals Judgment, 24 March 2000, § 131 – 134.; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeals Chamber, Appeals Judgment, 20 February 2001, § 26.; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Appeals Judgment, 17 December 2004, § 306 – 307.

883 ICC, Lubanga judgment, § 541, p. 248.

884 ICC, Lubanga judgment, § 542, p. 249.; Article 8(2)(xxvi) is formulated as follows:
"Article 8 – War crimes
1.The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2.For the purpose of this Statute, "war crimes" means: [...]
(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

885 ICC, Lubanga judgment, § 584, p. 268.

as *dolus eventualis*]".[886] The defence observed rightly that the Pre-Trial Chamber had based its conclusions on the first instance Decision in *Prosecutor v. Milomir Stakić*.[887]

Trial Chamber I answered this question after studying the motions of the Legal Representatives of Victims dealing *inter alia* with the 'should have known' test of the mental element.

During the analysis of "essential contribution" in the context of the material element of crimes, Trial Chamber I emphasized the importance of the distinction between principal liability and accessory liability and stated that "principal liability 'objectively' requires a greater contribution than accessory liability. If accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect."[888]

Hereby, the criteria of 'substantial effect on the commission of the crime' is backed by a long list of ICTY cases[889] completed with ICTR cases and a SCSL case.

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886 ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, § 587; ICC, Lubanga judgment, § 957, p. 414.

887 As the Trial Chamber I points it out, the ICC-01/04-01/06-2773-Red-tENG, § 80, referring to ICC-01/04-01/06-803-tEN, § 352, was a quotation.
See ICC, Lubanga judgment, footnote 2658, p. 414.

888 ICC, Lubanga judgment, § 997, p. 430.

889 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment, 7 May 1997, § 688 – 692.; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, § 325–329.; ICTY, *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, § 63.; ICTY, *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgment, 17 January 2005, §726.; ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001, § 352.; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, § 226, 229, 231, 233-235.; ICTY, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, § 61.; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, § 229.; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, § 102.; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, § 46, 48.; ICTY, *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, § 271.;
See ICC, Lubanga judgment, footnote 2704, p. 430.

## 2.4. The references to the International Criminal Tribunal for Rwanda

The first reference was apparently made in the context of the interpretation of the expression "actively participating in hostilities" as being synonymous – according to the defence, relying upon the *Rutaganda* and *Akayesu* cases – with "direct participation" understood as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[890]

Trial Chamber I answered this question later, after having studied the *travaux préparatoires*, the position of the victims and the special UN rapporteurs' reports as well as the SCSL-jurisprudence (see *infra*.) and apparently rejected the ICTR - line when it put that "[g]iven the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes 'active participation' can only be made on a case-by-case basis".[891]

The ICTR line is followed however in the *ratione temporis* determination of the end of the crime of enrolling or enlisting children in the armed forces, i.e. when the child leaves the army or when the child reaches 15 years of age.[892]

The defence evoked the ICTR in order to back the position that "an accused should not be at risk of a conviction on a basis that differs from the 'mode of responsibility' alleged when the proceedings were instituted".[893] (The issue is interrelated with the clarity of norms understood in the context of the *nulla poena sine lege*.)

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890 ICTR , *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgment, 6 December 1999, § 99.; reference is also made to ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, § 629.;
See ICC, Lubanga judgment, § 584 and footnote 1740, p. 268.

891 See ICC, Lubanga judgment, § 628, p. 286.

892 See ICC, Lubanga judgment, § 584 and footnote 1790, p. 282. (ICTR, Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, § 721.)

893 See ICC, Lubanga judgment, § 946 and footnote 2640, p. 410. (ICTR, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgment, 20 October 2010, § 37.)

The fact that accessories' contribution should reach the treshold of a "substantial effect on the commission of the crime" is required as a constitutive part of the material element of liability is founded *inter alia* also on the ICTR 's jurisprudence.[894]

## 2.5. The references to the Special Court for Sierra Leone

The prosecution evoked the SCSL for a proper interpretation of the expression 'enlistment' (i.e. childrens' enlistment in armed forces). The SCSL meant in this way „any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations".[895]

The question before the ICC in the Lubanga case was inter alia weather all the children being in the camps of the army and with the adult warriors had to be considered as enlisted or only those who were *de facto* warriors.

According to the prosecution, inspired by the SCSL practice „using children as bodyguards, allowing children (armed with cutlasses, knives and guns) to be present in active combat zones, using children to monitor checkpoints and leading 'Kamajors', or dancing in front of them as they go into battle, constitute the use of children to participate actively in hostilities."[896] As the prosecutor quoted the SCSL „the 'use' of children to participate actively in hostilities occurs when their

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894 ICTR , *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgment, 6 December 1999, § 43.; ICTR, Prosecutor v. Musema, Case No. ICTR-96-13-T, Trial Chamber I, Judgment and Sentence, 27 January 2000, § 126.; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Trial Chamber I, Judgment, 22 January 2004, § 597.; ICTR, *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber I, Judgment, 21 February 2003, § 787.; SCSL, CDF Appeal Judgment, § 73.;
See ICC, Lubanga judgment, footnote 2704, p. 430.

895 SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008 ("*CDF Appeal Judgment*"), § 144.;
See ICC, Lubanga judgment, § 573 and footnote 1719, p. 263.

896 ICC-01/04-01/06-2748-Red, § 141.; referring to SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber I, Judgment, 2 August 2007 ("*CDF Trial Judgment*"), § 688.;
See ICC, Lubanga judgment, § 576 and footnote 1723, p. 264–265.

lives are put at risk in combat and if they are present when crimes are committed, irrespective of their particular duties."[897] and „participation in hostilities includes any work or support that gives effect to, or helps maintain, the conflict."[898]

Trial Chamber I also found elements at least partly confirming this approach in the preparatory works of the Rome Statute.[899] (The defence tried to rebute this approach by evoking the ECHR principles, as presented supra and also by reminding that the given SCSL *dictum* was not unanimous and a dissenting opinion was attached thereto.[900]) The legal representatives of the victims relied on another SCSL-decision.[901]

Before Trial Chamber I answered all these issues, it expressed its opinion in an abstract way on the help and value of other international tribunals and namely those of the SCSL:

"The jurisprudence of the SCSL has been considered by the Trial Chamber. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the SCSL is identical to Article 8(e)(vii) of the Rome

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897 SCSL, *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber I, Judgment, 20 June 2007 ("*AFRC Trial Judgment*"), § 1267.;
See ICC, Lubanga judgment, § 576 and footnote 1724, p. 265.

898 SCSL, *CDF Trial Judgment*, § 193; SCSL, *AFRC Trial Judgment*, § 736.;
See ICC, Lubanga judgment, § 576 and footnote 1725, p. 265.

899 ICC, Lubanga judgment, § 576, p. 265.

900 Justice Robertson wrote:
"[...] forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front lines."
SCSL, *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson, 31 May 2004, § 9.;
See ICC, Lubanga judgment, § 582, footnote 1737 p. 267.

901 "Using children to 'participate actively in the hostilities' encompasses putting their lives directly at risk in combat [...] [A]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation".
SCSL, AFRC Trial Judgment, § 736 and 737.;
See ICC, Lubanga judgment, § 594, footnote 1756 p. 271.

Statute, and they were self-evidently directed at the same objective. The SCSL's case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute."[902]

As for the content of the expressions 'conscription' and 'enlisting'in the Rome Statute, Trial Chamber I – following the position of the Pre-Trial Chamber - emphasized that they cover both the voluntary and the coercive forms of recruitment and cited a view expressed in a SCSL dissenting opinion.[903]

When clarifying the content of the article 8(2)(e)(vii)[904] – it referred to the SCSL practice in order to state that here the justice is facing three alternatives (conscription, enlistment and use), which are separate offences.[905]

Further on the question of the adequacy of the children's consent was examined. The SCSL seems to back the orthodox position ("where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence"[906] and "the distinction between [voluntary enlistment and forced enlistment] is somewhat contrived. Attributing voluntary enlistment in the armed forces to a child under the age of 15 years, particularly in a conflict setting where human rights abuses are rife, is [...] of questionable merit."[907]), and apparently the Pre-Trial Chamber followed it[908], but Trial Chamber I was open towards a more nuanced approach: "The manner in which a child was recruited, and whether it involved compulsion

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902 ICC, Lubanga judgment, § 603, p. 275.

903 See ICC, Lubanga judgment, § 607, footnote 1776, p. 278, dissenting opinion of Justice Robinson, see *supra*.

904 "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities..."

905 See SCSL, *AFRC Trial Judgment*, § 733.; *CDF Appeal Judgment*, § 139, and Dissenting Opinion of Justice Robertson, § 5.;
See ICC, Lubanga judgment, § 609, footnote 1781 p. 279.

906 SCSL, *Prosecutor v. Fofana and Kondewa* case or *CDF Appeal Judgment*, § 139.;
See ICC, Lubanga judgment, § 616, footnote 1788 p. 281.

907 SCSL, *CDF Trial Judgment*, § 192.;
See ICC, Lubanga judgment, § 616, footnote 1789 p. 281.

908 "[...] a child's consent does not provide a valid defence to enlistment." (ICC-01/04-01/06-803-tEN, § 248).;
See ICC, Lubanga judgment, § 616 and footnote 1787, p. 281.

or was 'voluntary', are circumstances which may be taken into consideration by the Chamber at the sentencing or reparations phase, as appropriate. However, the consent of a child to his or her recruitment does not provide an accused with a valid defence."[909]

In matter of the interpretation of the legal content of 'participation in armed conflict' concerning children's prohibited participation in the armed conflict, Trial Chamber I benefited once again from the jurisprudence of the SCSL pronouncing that "[a]n armed force requires logistical support to maintain its operations. Any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation. Hence carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are some examples of active participation as much as actual fighting and combat."[910]

Trial Chamber I summarized the SCSL's position as follows: "The SCSL therefore held that the concept of "using" children to participate actively in hostilities encompasses the use of children in functions other than as front line troops (participation in combat), including support roles within military operations."[911] It quoted that "'[u]sing' children to 'participate actively in the hostilities' encompasses putting their lives directly at risk in combat."[912]

Much later, during the analysis of the difference between principal liability and accessory liabilility, Trial Chamber I considered it important to refer to the SCSL, thus completing the long list of references to certain ICTY and ICTR judgments.[913]

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909 ICC, Lubanga judgment, § 617, p. 281–282.
910 SCSL, *AFRC Trial Judgment*, § 737.;
See ICC, Lubanga judgment, § 624, footnote 1798, p. 284–288.
911 ICC, Lubanga judgment, § 625, p. 285.
912 SCSL, *AFRC Trial Judgment*, § 736.;
See ICC, Lubanga judgment, § 626, footnote 1800, p. 285.
913 SCSL, *CDF Appeal Judgment*, § 73.;
See ICC, Lubanga judgment, § 997, footnote 2704, p. 430.

### 2.6. International tribunals not mentioned in the Lubanga judgment

Apparently, no reference was made either to the jurisprudence of the Inter-American Court on Human Rights or to the International Military Tribunal of Nuremberg or of Tokyo. One can remember how often the International Military Tribunal of Nuremberg was referred to in the early jurisprudence of the ICTY. In the Lubanga case however as far as the accusation was based on the enlisting of child soldiers, the Nuremberg and Tokyo tribunals as well as the current jurisprudence of the IACHR could serve less pertinent „precedents" than the above mentioned ones.

## 3. THE LUBANGA SENTENCE AND THE INTERACTIONS

The presentation of interactions is easier in the sentence than in the case of the judgment: only two cases are cited from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and twenty references come from the Special Court for Sierra Leone.

Apparently no reference is made on the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Tribunal for Rwanda and International Military Tribunals of Nuremberg and Tokyo.

### 3.1. The references to the International Criminal Tribunal for the former Yugoslavia

While in the preliminary considerations, Trial Chamber I enumerates its guiding principles and emphasizes the avoidance of 'double counting'. ("Any factors that are to be taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances, and vice versa."), there is a reference on the ICTY.[914] The same judgment is referred to to underline that the

914 ICTY, *Prosecutor v. Nikolic*, Case No. IT-02-60/1-A, Appeals Chamber, Judgment on Sentencing Appeal, 8 March 2006, § 58.;
See Lubanga sentence, § 35, footnote 52, p. 14.

"gravity of the crime" is one of the principal factor in the determination of the sentence,[915] which should be proportional and reflect the individual culpability.

### 3.2. The references to the Special Court for Sierra Leone

The SCSL appears first in a special chapter entitled „The jurisprudence of other courts in relation to sentencing regarding child soldiers".

It begins with an abstract and correct evocation – similar to the already quoted one, see *supra* – of the utility and the limits of studying the corresponding jurisprudence of other courts: "Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the *ad hoc* tribunals are in a comparable position to the Court in the context of sentencing. However, the only convictions by an international criminal tribunal for the recruitment or use of child soldiers are from the Special Court for Sierra Leone."[916]

Then, follows a good recapitulation of the SCSL jurisprudence: "There have been seven[917] convictions at the SCSL in four cases for the crime of using child soldiers under the age of 15.[918] In two of those cases[919], the Trial Chamber did not address each count separately in its sentencing decision, and accordingly it is impossible to determine the effect the conviction for the use of child soldiers had on the overall sentences. The two cases in which separate sentences

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915 See Lubanga sentence, § 36, footnote 53, p. 14-15.

916 See Lubanga sentence, § 12, p. 6-7.

917 *Prosecutor v. Fofana and Kondewa,* Case No. SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008.;
See Lubanga sentence, § 12, footnote 22, p.7.)

918 SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Trial Chamber, Judgment, 2 August 2007 ("*CDF case*") ; *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012 ("*Taylor case*") ; *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber, Judgment, 25 February 2009 ("RUF case") ; *Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007 ("*AFRC case*").
See Lubanga sentence, § 12, footnote 23, p. 7.

919 The AFRC and Taylor cases. See Lubanga sentence, § 12, footnote 24, p. 7.

were handed down for the crime of using child soldiers are briefly discussed below."[920] The references themselves are in footnotes where the RUF case is presented in details[921] and the CDF sentence is presented only briefly.[922]

The main thesis is the following: "it is universally recognised and accepted that a person who has been convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes."[923]

## 4. CONCLUSION

The Lubanga judgments (the judgment and the sentence) contain a good number of references to the jurisprudence of other international tribunals. These references are sometimes *verbatim* quotations, sometimes rather general allusions to the jurisprudential line developed by these tribunals, especially in issues where the given element or construction of the underlying statute or convention are identical or very similar and so the voluntary importation is not hampered by difference of concept.

These issues were apparently the appreciation of circumstances of enlisting children into the army, some responsibility issues (i.e. principal liability and accessory liability), the „overall control" test, procedural fairness and the determination of the punishment.

The Lubanga judgments are not the only ones to be open to the jurisprudence of other international tribunals.

The Katanga decision on the confirmation of charges[924] taken by Pre-Trial Chamber I, composed of Presiding Judge Akua Kuenyehia & judges Anita Usacka and Sylvia Steiner, also contains numerous interactional references. Some of them are *quasi* identical to the Lubanga judgment e.g. the reference to the International Court of

920 Lubanga sentence, § 12, p. 7.
921 Lubanga sentence, § 13–14, p. 7–8.
922 Lubanga sentence, § 15, p. 7.
923 SCSL, *RUF Sentencing Judgment*, § 18. Lubanga sentence, § 14, footnote 33, p. 8.
924 International Criminal Court, 2008b: To the 213 page long decison, judge Anita Usacka wrote a 13 page long partly dissenting opinion.

Justice and namely to the case of the Democratic Republic of Congo v. Uganda[925]. Several judgments of the European Court of Human Rights are also cited[926] and the most number of references concern the International Criminal Tribunal for the former Yugoslavia.[927] The International Criminal Tribunal for Rwanda[928] is also well

925 International Court of Justice, 2005.

926 ECHR (indicated in the decision as ECtHR , enumeration in order of appearance*), Kostovski v The Netherlands*, Judgment of 20 November 1989, Application No. 11454/85, § 44.; *Imbrioscia v. Switzerland*, Judgment, 24 November 1993, Application No. 13972/88, §. 35, 36.; *Brennan v. The United Kingdom*, Judgment, 16 October 2001, Application No. 39846/98, § 45.; *John Murray v. The United Kingdom*, Judgment, 8 February 1998, Application No. 41/1994/488/57, § 62-63.; *Magee v. The United Kingdom*, Judgment, 6 June 2000, Application No. 28135/95, § 41.; *Schenk v. Switzerland*, Judgment, 12 July 1988, Application No. 10862/84.; *Öcalan v. Turkey*, Judgment, 12 March 2003, Application No. 46221/99. § 140.; and Grand Chamber Judgment of 12 May 2005, § 131.; *Salduz v Turkey*, Judgment of 26 April 2007, Application No. 36391/02, § 22.

927 ICTY (enumeration in order of appearance), *Prosecutor v. Naser Oric* , Case No. IT-03-68-T, Trial Chamber, Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 21 October, 2004, § 8.; *Prosecutor v. Milan Manic*, Case No. IT-95-11-T, Trial Chamber, Decision adopting guidelines on the standards governing the admission of evidence, 19 January 2006, §5.; Prosecutor v. Radoslav Brdanin and Momir Talic, Case No. IT-99-36-T, Trial Chamber, Order on the Standards Governing the Admission of Evidence, 15 February 2002, § 18.; *Prosecutor v Mucic et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, § 33-34.; *Prosecutor v. Kupreskic et al*, Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, § 31.; *Prosecutor v. Blaskic,* Case No. IT-95-14, Trial Judgment, 3 March 2000, § 36.; and Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, § 101, 124.; *Prosecutor v. Naletilic and Martinovic,* Case No. IT- 98-34-T, Trial Judgment, 23 March 2003, § 203-205.; *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, Trial Judgment, 25 June 1999, § 229.; and Case No. IT-95-14/1-A, Appeals Judgment, 24 March 2000, § 147-152.; *Prosecutor v. Tadic* Case No IT-04-1-AR72-A, Appeals Judgment, 15 July 1999, § 166.; *Prosecutor v. Kvocka et al.* Case No. IT-98-30/1-T, Trial Judgment, 2 November 2001, § 173, 179.; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, § 179.; and Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, § 94, 99.; *Prosecutor v. Kunarac*, IT-96-23&23/1, Trial Judgment, 22 February 2001, § 157.

928 ICTR (enumeration in order of appearance), *Prosecutor v. Bagosora*, Case No. ICTR-94-1-T, Trial Chamber, Decision on Motions for Judgment of Acquittal, 2 February 2005, § 40.; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, § 332.; *Prosecutor v. Akayesu*, Case No. ICTR-96-40-

referred to and the Special Court for Sierra Leone[929] is also cited in the Katanga decision.

The judgments to be taken in the future will reveal whether the above presented tendencies will continue.

*Addendum 2024*: Not surprisingly, the answer to the above question is positive. I tried to follow later also the jurisprudential interactions and I covered some of their aspects in two articles, published in French.[930]

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T, Trial Judgment, 2 September 1998, § 580.; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, § 123.; *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, Trial Judgment, 6 December 1999. § 67-68.; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, 1 December 2003, § 869-870.

929 SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, 20 June 2007, § 110.

930 See : Kovács, 2022, pp. 58-69.; Kovács, 2017, pp. 245-262.

# CHAPTER IX

# Languages and linguistic issues before the International Criminal Court[931]

## 1. INTRODUCTION

Languages have their special role in all international organizations or entities formed inevitably by more than one state as they bring together people coming from different countries with different linguistic backgrounds with the aim of working for a common cause. There are of course some monolingual organizations, in particular those where a common linguistic heritage is the core of the will to work together but today's international organizations are typically multilingual especially when their ambition is to become more and more in number.

International organizations incorporating international tribunals – particularly when these tribunals do not or do not only deal with interstate litigation but are vested with powers to adjudicate over individuals' criminal charges - traditionally settle linguistic issues (e.g. official languages, linguistic parities in different bodies or main functions) using rules linked to the rights of the accused and other aspects of the fair trial.

Nevertheless there are always issues which cannot be provided for well in advance, questions, problems and challenges may emerge as a consequence of the peculiarities of a given situation or a given case.

931 This chapter was published originally in the 'Hungarian Yearbook of International law and European Law, 2019, 7(1), pp. 155-167.'. I thank editor-in-chief Marcel Szabó for his consent to the republishing.

As my paper is much more centered on languages than law, I ask in advance the readers' understanding for the shortened references on the jurisprudence and at the same time the extensive references on information sheets published by the ICC, especially when I am dealing with ongoing procedures. I tried to find open access and encyclopedia type references on different languages or special military term technics etc. that may be unknown or not precisely known to the reader.

Following a short presentation of how the issues are regulated in the Rome Statute of the International Criminal Court and some real problems, difficulties and challenges will be examined.

## 2. LINGUISTIC REGIME IN THE ROME STATUTE

As mentioned *supra*, there are some typical linguistic questions which should always be settled in a multilingual organization. This had to be done by the drafters of the Rome Statute as well.

That's why beside a general rule on the six official languages (i.e. Arabic, Chinese, English, French, Russian and Spanish)[932] out of which two (English and French)[933] are the working languages of the judiciary, some special rules were inserted in articles dealing with

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932 Rome Statute, Article 50 (1): "The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph."

933 Rome Statute, Article 50 (2): "The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages."
The Rules of Procedure and Evidence (to be mentioned in the followings only as RPE) in its Rule 41 stipulates:
"Working languages of the Court
1. For the purposes of article 50, paragraph 2, the Presidency shall authorize the use of an official language of the Court as a working language when:
(a) That language is understood and spoken by the majority of those involved in a case before the Court and any of the participants in the proceedings so requests; or
(b) The Prosecutor and the defence so request.

the Assembly of States Parties[934]. The linguistic criteria is mentioned in articles dealing with candidacy for Judge[935], Prosecutor and Deputy-Prosecutor[936], Registrar and Deputy-Registrar[937] and even if not *expressis verbis* mentioned in the Rome Statute but definitely required from the staff.[938]

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2. The Presidency may authorize the use of an official language of the Court as a working language if it considers that it would facilitate the efficiency of the proceedings."
According Rule 42 of the Rules of Procedure and Evidfence:
"The Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules."

934 Rome Statute, Article 112(10), Assembly of States parties:
"The official and working languages of the Assembly shall be those of the General Assembly of the United Nations." These are (since 1983) the same six languages, i.e. contrary to the languages of the judiciary, Arabic, Chinese, English, French, Russian, and Spanish are legally on equal footing.

935 Rome Statute, Article 36(3)(c), Qualifications, nomination and election of judges:
"Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."

936 Rome Statute, Article 42(3), The Office of the Prosecutor:
"The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."

937 Rome Statute, Article 43(3), The Registry:
"The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court."

938 Rome Statute, Article 44, Staff:
"(1) The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
(2) In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis,* to the criteria set forth in article 36, paragraph 8."
*Nota bene*: Rome Statute, Article 36(8) deals however with different aspect of the equitable representation. But I think that there is no doubt that the words on "qualified", "efficiency" "competency" cover adequately the linguistic knowledge, even if the primacy of the English is manifest.

The fair trial related aspects of languages shows similarities with rules of national criminal procedural law i.e. the rights of person under investigation[939] and the rights of the accused[940]. These rules complete the one that mandates the judges to determine the language(s) of the procedure.[941]

The third type of rules on languages is related to the cooperation between the ICC and states and with special regard to the documents of the judicial assistance.[942]

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939 Rome Statute, Article 55(1), Rights of persons during an investigation:
"In respect of an investigation under this Statute, a person:
(...]) (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness."

940 Rome Statute, Article 67(1), Rights of the accused:
"In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (...)
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks; (...)"

941 Rome Statute, Article 64(3), Functions and powers of the Trial Chamber:
"Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (...)
(b) Determine the language or languages to be used at trial; and (...)"

942 Rome Statute, Article 87(2), Requests for cooperation: general provisions:
"Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession."
Rome Statute, Article 99(3), Execution of requests under articles 93 and 96:
"Replies from the requested State shall be transmitted in their original language and form."
*Nota bene*: the title refers to the so called "other forms of cooperation", i.e. other than arrest, provisional arrest, surrender, extradition.

## 3. LANGUAGE ISSUES IN PRACTICE

### 3.1. English as common law English?

Two of the official languages, i.e. English and French, which are also qualified as working languages, bring up now and then classical problems of interpretation in the same way as in any other fields of international law. As it is well known, the main part of the work of drafting of the Rome Statute was done first in English.

Two of the most widely used commentaries[943] are in English and a third one is in French, the English commentaries being more detailed. This also contributes to a more accentuated presence of English as compared to what was originally expected in Rome.

Moreover, English means legal English i.e. the impact of the terminology of the world of the common law, sometimes in UK, sometimes in US terms.

It is true that as to the Rome Statute and the other norms, the use of "specific common law terminology (....) was, as in other parts of the ICC legal regime, deliberately avoided, in order not to prejudge the procedural approach to be taken."[944] Others claim, nevertheless, that depending on chambers, it is well present in the practice "although in cases against Mr. Bemba and Mr. Lubanga Trial Chambers preferred using neutral terms, in The Prosecutor v. Katanga and Ngudjolo, the ICC did formally adopt the traditional common law terminology."[945]

It is clear that the text of the decisions prepared in English contain plenty of common law terms or of formulas of the judicial practice.[946]

A good example of this phenomenon is the "*No case to answer*" motion, which was accepted after certain hesitation as belonging under

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943 Triffterer, Ambos, 2016.; Fernandez, Pacreau, 2012.

944 Ambos, 2016, p. 465.

945 'Powers of the Prosecutor Before the Trial Chamber' Available at: https://lawexplores.com/powers-of-the-prosecutor-before-the-trial-chamber/#Fn96

946 "Pre-trial brief"; "appeal brief", "requested remedies"; "admissibility challenge"; "the request for a leave to appeal is granted"; "a good cause is shown"; "failed to raise any new factual grounds"; "it is not an appealable issue"; "it does not warrant an immediate solution"; "the submission failed to demonstrate the impact of alleged errors on (...)"; etc.

the umbrella of the general principles of law mentioned as an element of the "applicable law".[947] While continental law also knows the drop of the charges by the prosecutor or the indictee's acquittal for lack of adequate and /or sufficient evidence necessary for a conviction beyond reasonable doubt, common law grants a legal possibility to the defence to "provoke" the acquittal (or the discontinuation of the case) even during the Prosecutor's case (i.e. before opening the defence's case) if the submitted evidence seems to be insufficient for a conviction.

Applied effectively in the case The Prosecutor v. Ruto[948], but rejected in the case The Prosecutor v. Bosco Ntaganda, *no case to answer* was explained by the Appeals Chamber in the following manner: "the Court's legal texts do not expressly provide for a 'no case to answer' procedure. Moreover, the Appeals Chamber is not aware of any proposals made or discussions held during the drafting of the Statute or the Rules of Procedure and Evidence ("Rules") in relation to such a procedure. (....) Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. (...) A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute."[949]

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947 Rome Statute, Article 21(1), Applicable law:
"The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. (...)"

948 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Questions and answers arising from the decision of no-case to answer in the case of Prosecutor v Ruto and Sang. Available at: https://www.icc-cpi.int/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf (Accessed: April, 2018).

949 International Criminal Court, 2017b, § 43-44.

This example of the presence of common law within the jurisprudence of the ICC, a topic researched in abundance by scholars[950] was only brought here to show that what is already a challenge in understanding is an even bigger challenge for the interpreters. As Ludmila Stern puts it, "The interpreter and translator must therefore find the means of overcoming the lack of lexical equivalents for legal practices that are articulated differently in other systems."[951] As Leigh Swigart notices, "The need to accommodate both English and French speakers also raises some interesting linguistic phenomena. The mixing of elements in international criminal courts and tribunals from different legal systems and trial procedures has necessitated the creation of terms in working languages that did not previously exist."[952]

If harmonizing legal English and legal French seems difficult, the situation is even more complicated when small, local languages are involved, as we will see *infra*. Prieto Ramos rightly states that "at the ICC, the most challenging terminological difficulties arise precisely in the translation of less or non-standardised languages used by testifying witnesses to whom concepts such as 'victim' are unknown".[953]

### 3.2. Local languages in the Ituri district of the Democratic Republic of Congo and the ICC

The latent conflict between hema,[954] lendu[955] and ngiti[956] communities turned into a bloody civil war around 2000. Thomas Lubanga's condemnation[957] for enlisting and using child soldiers and Germain

950 See e.g. Bitti, 2001, pp. 273-283.; Christensen, 2001, pp. 391-424.; Picker, 2008, pp. 1083-1140.; Palomares, 2014, pp. 217-235., etc.
951 Stern, 2004, p. 63.
952 Swigart, 2016.
953 Prieto Ramos, 2014, p. 320.
954 On the Hema language, see Frawley, 2003, Volume 1, p. 302.
955 On the Lendu language, see Frawley, 2003, Volume 1, p. 302
956 On the Ngiti language, see Frawley, 2003, Volume 1, p. 304
957 Case Information Sheet: The Prosecutor v. Thomas Lubanga Dyilo. Available at: https://www.icc-cpi.int/CaseInformationSheets/LubangaEng.pdf

Katanga's condemnation[958] for his assistance to the massacre of the inhabitants of Bogoro village were linked to this background as well as the trial against Bosco Ntaganda[959].

The transcription of local names, war names and toponyms into English or French meant a minor challenge (i.e. whether the very similar but not identical forms cover the same person or two persons, different places) during the trial as well as during the reparation phase, but as always, the real difficulty was that sometimes the oral testimony of a witness during the trial was not as precise as or even very different from that registered years before, during the contacts established with them by the investigators or experts working on the reparations.[960] All in all, the concrete elements in a victim's narrative, remembrances of names of commanders, localities of military engagement etc. played an important role in the assessment of the eligibility for reparation[961] but these elements are to be found in documents written by lawyers,

958 Case Information Sheet: The Prosecutor v. Gernain Katanga. Available at: https://www.icc-cpi.int/CaseInformationSheets/KatangaEng.pdf

959 Case Information Sheet: The Prosecutor v. Bosco Ntaganda. Available at: https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf

960 See on that issue the summary of the defence's remarks (in § 60 with a number of examples in footnotes) and the Trial Chamber II considerations (in § 64) in the Lubanga reparation order.
"60. (...) The Defence also points to contradictions and inconsistencies in the accounts of some potentially eligible victims regarding the circumstances of their enlistment, in particular to contradictions between participation forms and reparations forms or between reparations forms completed on different dates."; "64. (...) In that connection, it is of note that in Katanga the Chamber considered – as have other Chambers of this Court in relation to applications for participation – that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.", at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3379-Red

961 "64. The Chamber pays particular attention to the level of detail of the facts described, including the circumstances of enlistment, the positions held and duties performed in the UPC/FPLC, the living conditions in the militia and the circumstances in which the victim left the UPC/FPLC. The Chamber also looks at references to relevant information, such as the activities connected to child-soldier status, the sites of recruitment, training, deployment (including battlefields) and demobilization, the names of superiors in the UPC/FPLC militia, and the organizations responsible for demobilization. (...)", available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3379-Red

national or international collaborators devoted to the task of fighting against impunity and for granting justice and reparation to victims but not forcibly trained to provide the proper transcription of an orally heard geographical or personal name while putting into writing what the given person without or with only a very rudimentary knowledge of French told them. Interpreters helped these contacts of course in order to be as precise as possible in the documentation.

The other side of the coin is the assessment of the language skills of the person under trial. As I cited during the presentation of legal framework, the person under arrest or under trial definitely enjoys assistance of translation when needed. (On the other hand, the choice between full or partial translation into working languages may be linked to the relevance of the item[962].) The Court's practice can be considered as being in conformity with the standard settled by the international human rights' jurisprudence.[963] It is worth noting that in the Katanga trial – in the phase dealing with the determination of the applicable sentence - the Prosecutor submitted that the continuous translation to Lingala – granted on the indictee's demand - was not really necessary and this should be taken into consideration when assessing Katanga's cooperation with the Court.[964] However, apparently, the Court did not react to this submission.

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962 "9. Conversely, whilst the statutory instruments do not make it mandatory for the Prosecutor to provide translation of disclosed evidence into one of the working languages of the Court, the need for translation into a working language of the Court does indeed arise in respect of any portion of evidentiary item which is relevant to the nature, cause and content of the charges and upon which the Prosecutor intends to rely for the purposes of the confirmation hearing and will therefore include in her list of evidence. Those items will form the basis for the Chamber's determination on the charges brought by the Prosecutor and must therefore be submitted in a working language of the Court."
International Criminal Court, 2014e.

963 See in detail in Triffterer (referred *supra*), in comments made by William A. Schabas and Yvonne McDermott, pp. 1661, 1672.

964 "The Prosecution denounced the behaviour of the convicted person in that he insisted on Lingala interpretation throughout proceedings at both the preliminary and the trial stages, whereas, in due course, he chose to testify in French, showing perfect mastery of the French language". Available at: https://www.icc-cpi.int/CourtRecords/CR2015_19319.PDF

### 3.3. Acholi and other traditional languages of Northern Uganda before the ICC

One of the cases currently in trial – and one in which I sit as a judge - is The Prosecutor v. Dominic Ongwen. The charged person – himself an abducted child once – is alleged to be one of the military leaders of the Lord's Resistance Army fighting in the Northern part of Uganda against governmental forces. As of this writing, the evidence presentation in this case is still ongoing.

In the regions concerned, a good part of the local population, especially those whose schooling was interrupted by armed conflicts, abduction or as a result of their parents' poverty do not speak English (or at least not a fluent, educated English) but only different local languages, like Acholi[965], Luo[966] (some consider the first as a dialect of the second), Lango[967], Swahili[968], etc. Since Mr Ongwen only fully understands and speaks Acholi, translation services had to be secured for him in this language. Acholi courtroom interpreters also translate the words of many of the witnesses who have testified in the case.

The Prosecutor attributes a great importance to the intercepted radio communications allegedly between Joseph Kony, LRA leaders and the different commanders. Without making any comment on the authenticity or contents of these communications, it is noted that they have to be accurately translated into English in order to be understood by the Chamber. The speakers in these recordings may not be using standard language, noting that evidence has been received that LRA communications in Acholi were filled with regularly changing coded expressions and coded names in order to prevent the Ugandan army and police from understanding the communicated messages, orders and reports. Evidence has also been received on the work done by intelligence and radio experts of the Ugandan authorities to break these codes.

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965 On the Acholi language, see Frawley, 2003, Volume 1, p. 495.
966 On the Luo languages, see Frawley, 2003, Volume 1, p. 498.
967 On the Lango, see Frawley, 2003, Volume 1, pp. 497-498.
968 On the Swahili, see Frawley, 2003, Volume 1, p. 181.

This presupposes not only the establishment of a network of professional Ugandan Acholi interpreters and translators[969], but the necessary time and resources required in order to secure a high-quality simultaneous translation in a complex legal case where the Acholi language does not always have clear analogues to the legal notions used at the ICC. Some difficulties can be overcome, for example, by using explanations and paraphrases. The correct transposition of toponyms, tribal names and military aliases is also problematic. But the difficulties or eventual mistakes which occur at the time when they were put into writing in English are corrected when the so-called real-time trial transcript is transformed into an "edited transcript". Parties may also request corrections to edited transcripts.[970]

Some local words have become widely used orally even in the English text of the trial, like "*lapwony*" (i.e. meaning literally "teacher" but witnesses describe it as being used rather as "comerade" referring to fellow LRA soldiers and adding this after his name or nickname), "*ting-ting*" (i.e. described as an abducted girl living and working in the household of the commandants), "*dog adaki*" (i.e. described as the guarded area surrounding where commanders lived). The word "*kadogo*" (described by witnesses as referring to child soldiers) is also used in Uganda like in other African countries. Once their content made clear and thoroughly understood, it is easier for the participants at trial to use these exact words instead of having recourse to paraphrases or simplifying the meaning of the expression.

It is clear that even in the testimonies in Acholi, words belonging to the military English vocabulary (e.g. a battalion, a brigade, a recoiless[971], an LMG[972]) or military Russian (e.g. a PK[973], an AK[974], an

969 See on the technic of recruitment and formation: Leigh Swigart, 2016, p. 9.

970 Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, § 38, at http://www.legal-tools.org/doc/60d63f/.

971 See https://www.encyclopedia.com/social-sciences-and-law/political-science-and-government/military-affairs-nonnaval/recoilless-rifle

972 See http://www.weaponslaw.org/weapons/light-machine-gun

973 See https://modernfirearms.net/en/machineguns/russia-machineguns/pk-pks-pkm-pkms-eng/

974 See https://www.warhistoryonline.com/guns/14-facts-ak-47.html

RPG[975]) as absorbed in military English are recognizable, especially when referring to different weapons.

Even if the word "barracks" is often mentioned in the context of certain charged attacks[976], the reader of this article should understand it in the local meaning i.e; rather as a quantity of small ground huts, surrounded by trenches and barbed wire with some observation posts than dwellings of considerable size with large fortifications.

### 3.4. Arabic and traditional languages of Mali before the ICC

Ahmad Al Faqi Al Mahdi[977] was charged by the Prosecutor and condemned under guilty plea by Trial Chamber VIII for crime of destruction of cultural monuments committed in 2012 in Timbuktu. The Prosecutor also submitted different charges against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud.[978] Both of them chose Arabic as the language on which they would like to be informed on charges[979], but some other languages, namely Tamasheq[980] or Songhay[981] and Bambara[982] are also playing an important role in the procedure.

These languages are used *inter alia* during consultations[983] with a good number of victims and and to help them with their application for

975 See https://modernfirearms.net/en/grenade-launchers/russia-grenade-launchers/rpg-7-eng/

976 Namely against the villages of Abok, Lukodi, Pajule and Odek.

977 See https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF ; See 'Case Information Sheet The Prosecutor v. Ahmad Al Faqi Al Mahdi' at https://www.icc-cpi.int/CaseInformationSheets/Al-MahdiEng.pdf

978 See 'Case Information Sheet The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud' at https://www.icc-cpi.int/CaseInformationSheets/al-hassanEng.pdf

979 International Criminal Court, 2018j, §§ 5,9 and 13.

980 On the Tamasheq language, see Frawley, 2003, Volume 1, p. 222.

981 On the Songhay language, see Frawley, 2003, Volume 1, p. 110.

982 On the Bambara language, see Frawley, 2003, Volume 1, p. 198.

983 Public redacted version of "Annex to the Registry's Joint Report on Outreach and Other Victim Related Issues", 27 July 2018, ICC-01/12-01/18-102-Conf-Exp-Anx, at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-102-Anx-Red

their participation in the procedure[984] etc. Because of many victims' lack of knowledge of Arabic, a considerable number of witness statements were deposited in Tamasheq or in Songhay. In order to render accessible the apology pronounced in Arabic by Mr. Al Faqi's also to as much people as possible in Mali , versions in Bambara, Songhaï and Tamasheq were also prepared and put on the homepage of the case.[985]

As a result, people understanding Tamasheq, Songhay, Bambara had to be engaged[986] with all the direct consequences on the budget.[987]

As far as Arabic is concerned, it is to be noted that the transcription of the same Arabic first and family names and geographical names into English and French respectively often results in slightly different forms and not only in the form of "sh" in English and "ch" in French. Moreover, despite of scholarly articles[988] written on this subject, when the transposition of a name is made e.g. by a local lawyer while typing his client's testimony, it can happen that the transposition is not always *lege artis*.

And as always, the issues of names, surnames, patronymes etc. emerge, written sometimes according to Arabic (e.g. Mohamed ibn Hussayn) and elsewhere according to Tamasheq (as Mohamed Ag

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984 See https://www.icc-cpi.int/mali/al-hassan ;
See https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassanAppFormInd_TAQ.pdf ;
See https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassanAppFormORG_TAQ.pdf ;
See https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassan-AppForm-Guidelines_TAQ.pdf ;
See https://www.icc-cpi.int/itemsDocuments/alHassan/2018-alHassan-AppForm-Guidelines_Organizations_TAQ.pdf

985 See at https://www.icc-cpi.int/mali/al-mahdi

986 On the recruitement aspects, see: on the ICC homepage under „Career Opportunities: Freelance Transcriber - Bambara, Fulfulde, Hassaniyya, Songhay or Tamasheq (18761)", at https://www.icc-cpi.int/jobs/pages/vacancies.aspx

987 See § 119 of the Proposed Programme Budget for 2018 of the International Criminal Court. at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-10-ENG.pdf

988 Saadane, Semmar, 2013, pp. 57-68.

Hussayn) but covering the same person when this can be established from the details of an individual's narrative.[989]

All this does not mean a major difficulty but certainly requires a continuous attention on behalf of the legal staff of the ICC.

If there is a legal English, certainly there exists also a legal Arabic, which, moreover, is often related with the Islam.

Because the introduction of Sharia in Timbuktu with such punishments like flogging (qualified by the Prosecutor as torture) or the alleged forced marriages (understood by her as sexual slavery ) played an important part already in the request for arrest warrant[990] which was granted by the Pre-Trial Chamber[991], one may assume that the

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989 These names are shown in the present article only as a fictitious example.

990 Version publique expurgée de la "Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud", 20 mars 2018, ICC-01/12-01/18-1-Red, at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-1-Red (There is no English translation for this document.)

991 "60. The material submitted by the Prosecutor further shows that there was a defined policy to attack the civilian population. The policy was defined in that the armed groups wished to impose their authority and their new religious order. The policy followed a regular pattern in that it involved strict rules, prohibitions and punishments and was calculated to oppress anyone who failed to demonstrate the required religiosity, in particular women and girls. (...)" (*Footnotes omitted*!)

"70. The Prosecutor submits that there are reasonable grounds to believe that the members of the armed groups Ansar Dine and AQIM committed crimes against humanity of acts of torture. The Prosecutor refers to several methods of interrogation, physical violence and other brutal sanctions allegedly constituting cases of torture.97 The Prosecutor alleges that, in some cases, violations of the new rules by the population were referred to the Islamic court, which then ordered physical punishments, such as whipping in public." (*Footnotes omitted*!)

"81. The Prosecutor submits that there are reasonable grounds to believe that women and girls in Timbuktu were forced to marry members of Ansar Dine and AQIM. The Prosecutor alleges that, although the families of the victims generally received a dowry in exchange, they were not free to object to the members' wishes and were either forced to submit or did so out of fear of retaliation. The Prosecutor alleges that the purpose of these marriages was to legitimize the rapes and sexual violence perpetrated against the victims by the members of the armed groups, and to integrate the members of the armed groups into the population. As noted above, the Prosecutor alleges that about

Arabic of criminal law and criminal procedural law and the Arabic of family law will probably play a certain role in the procedure and moreover the term technics are often related with precise notions and formulas of the Quran.

All these challenges can be managed and dealt with, but they require time, skills, continuous attention and knowledge.

It is not an easy job for legal officers working for the Prosecution or the Judiciary...

It is to be noted that the Defence asked also in the Al Mahdi and in the Al Hassan cases– according to article 50 §§ 2, 3 (pre-cited) of the Rome Statute - to use Arabic as well as a language in which oral submissions can be made by the legal counsel of the person under charges. The request was granted in the first case[992], but the Presidency dismissed it in the second, as improperly submitted, i.e. directly before the Presidency and not before the relevant chamber.[993]

## 4. BY WAY OF CONCLUSIONS

The International Criminal Court has on its table other situations under investigation involving several other languages (e.g. Georgian, Russian and eventually[994] also Ossetian[995] in the so called Georgian

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forty cases of rape, sexual slavery and other sexual violence took place in the context of forced marriage." (*Footnotes omitted!)*
Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ICC-01/12-01/18-35-Red2-tENG, available at: https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/18-35-Red2-tENG

992 See the reference in Defence request to authorise the use of Arabic as a working language, ICC-01/12-01/18-268 08-03-2019, available at: https://www.icc-cpi.int/CourtRecords/CR2019_01335.PDF, § 7.

993 Decision on the admissibility of the "Defence request to authorise the use of Arabic as a working language", ICC-01/12-01/18-302 04-04-2019, at https://www.icc-cpi.int/CourtRecords/CR2019_01895.PDF , especially §§ 17-19.

994 Due to South Ossetia's past since 1801 in the Czarist Russia and then in the Soviet Union (at that time as a so called autonomous territory within the Georgian Soviet Socialist Republic), the Russian can be considered as a *lingua franca* for the inhabitants of this territory.

995 On the Ossetian language, see: Worldmark Encyclopedia of Cultures and Daily Life 2009 Cengage Learning, available at: https://www.encyclopedia.com/

situation[996]) and there are situations under preliminary-examination like the Rohingyas' situation[997] involving also a language[998] which is the only one for most of the victims, etc. All these have their special difficulties, challenges and legal and, last but not least, budgetary implications.

My ambition in the present contribution was not to give a comprehensive legal analysis but only to highlight some points which deserve a proper attention and may invite for further researches, similarly to researches published on the language issues before the ICTY, ICTR or the STSL.[999]

It is worth studying the linguistic challenges that the International Criminal Court faces and these cannot be restricted only to the relationship of English and French in the Rome Statute and in the jurisprudence of the Court.

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humanities/encyclopedias-almanacs-transcripts-and-maps/ossetians

996 See https://www.icc-cpi.int/georgia
On the recruitment aspects, see Career Opportunities: Freelance Transcriber - Georgian, Ossetian or Russian (18759), see at https://www.icc-cpi.int/jobs/pages/vacancies.aspx

997 See https://www.icc-cpi.int/rohingya-myanmar

998 On the Rohingya language, see Worldmark Encyclopedia, available at: https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/rohingyas

999 Stern, 2004, pp. 63-75., Swigart, 2016, p. 1-16, covering not only the International Criminal Tribunal for Yugoslavia (ICTY), but also the lessons learned from the practice of the International Criminal Tribunal for Rwanda (ICTR), the Special Tribunal for Sierra Leone (STSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

# CHAPTER X

# 'Traditional' international law and preliminary ruling in the jurisprudential practice of the International Criminal Court

**THE PRESENT CHAPTER** can be divided into two sub-chapters, namely to a first one devoted to the analysis of Article 21 (1)(b) of the Rome Statute[1000] and to a second one dealing with the peculiar position of the 'preliminary ruling' in the Rome Statute and in the jurisprudence of the International Criminal Court.[1001]

1000 The content of this sub-chapter was first published under the title " "In the second place, where appropriate..." (Considerations on the position of international law in the jurisprudence of the International Criminal Court)" in Wierczyńska - Kowalik-Bańczyk – Taborowski – Jakubowski (eds): "Euphony, Harmony and Dissonance in the International Legal Order" - Liber Amicorum dedicated to Władysław Czapliński, Warsaw 2024, Wydawnictwo INP PAN, Publishing House of the Institute of Law Studies Polish Academy of Sciences. In the present chapter, the *Personalia* part is omitted. I thank the editors for their consent to the republishing.

1001 The content of this sub-chapter was first published under the title "The peculiar position of the 'preliminary ruling' in the Rome Statute and in the jurisprudence of the International Criminal Court" in Gorski, Adam – Sakowicz, Andrzej - Swiatlo, Andrzej – Czarnecki Pawel, Glogowska, Sonia (eds) (2024): "Hominum causa omne ius constitutum sit": a book dedicated to Professor Piotr Hofmański. Warszawa: Wolters Kluwer.
In the present chapter, the *Personalia* part is omitted. I thank the editors for their consent to the republishing.

## 1. "IN THE SECOND PLACE, WHERE APPROPRIATE..." (CONSIDERATIONS ON THE POSITION OF INTERNATIONAL LAW IN THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT)

As it is well known, the enumeration of the 'applicable sources' for the International Criminal Court as they are stipulated in the Rome Statute shows similarity with the approach of the Convention on the International Court of Prize, never having entered into force, which, according to the general scholarly opinion was due to the hierarchical structure of the 'sources'[1002] considered as referring to the sources of the international law.

Whether this was the states' real motivation or not, it is clear that the Statute of the Permanent Court of International Justice drafted in the context of remaking world order after WW I contained an opposite approach: no subordination was attached to the enumeration of sources[1003] and States joined the PCIJ rapidly and in a surprisingly high number. The Statute of the International Court of Justice is at

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1002 The Hague Convention XII (Convention Relative to the Creation of an International Prize Court),
Convention of the IPC: Article 7:
"If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty.
In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity. (...)"

1003 Statute of the PCJI: Article 38, The Court shall apply:
"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

this point *quasi verbatim* identical, the new introductory words do not alter the non-hierarchical concept.[1004]

However, the Rome Statute enumerates the 'applicable sources' *prima facie* in a hierarchical way.[1005]

When analysing the *travaux préparatoires* of article 21 of the Rome Statute, the commentaries explain the hierarchy with the States' will to be in harmony with the *nullum crimen sine lege*

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1004 Statute of ICJ Article 38:
"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations ;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

1005 ICC Article 21 Applicable law:
"1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

principle stipulated in article 22 and in particular its second paragraph about the prohibition of extension by analogy[1006].

This explanation can be found e.g. in the Triffterer - Ambos Commentary[1007] in the comments made by deGuzman,[1008] who puts that "the principal issue at stake in drafting Article 21 was how much discretion should be granted to the ICC's judges in light of the conflicting demands of the principle of legality on the one hand, and, on the other, the inevitability of lacunae in a nascent legal system."[1009] The original draft of the International Law Commission followed at this point the style of article 38 of the ICJ Statute and while most of the intense discussions were about the 'general principles of law', whether they cover or allow the invocation of national legal norms and whether national law should be or should not be explicitly mentioned beside them, the stipulation of hierarchy did not appear even in the last draft[1010] of July 11, 1998, which means that we may presume that it was added by the team led by Philippe Kirsch during the finalization of the text. Concerning the additional element of the hierarchy, deGuzman puts in Triffterer - Ambos that "[t]he inclusion of the phrase 'where appropriate' serves to emphasize the discretion of the Court enjoys in determining the applicability of treaties and principles and rules of international law."[1011] The commentator states that such an invocable treaty can be the agreement with the host state.[1012]

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1006 Rome Statute, Article 22, *Nullum crimen sine lege:*
"1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

1007 Ambos, 2022.

1008 deGuzman, 2022, pp. 1130-1148.

1009 deGuzman, 2022, p. 1130.

1010 deGuzman, 2022, pp. 1131-1132.

1011 deGuzman, 2022, p. 1137.

1012 deGuzman, 2022, p. 1137.

The Klamberg Commentary,[1013] where Article 21 is analysed by Mikaela Heikkilä[1014], also concludes that there is hierarchy and it shows the jurisprudential approach which allows the reference to the 'external sources' of article 21(1)(b) *'only in case of lacuna'*.[1015] The commentator adds that the existence of a lacuna is to be interpreted restrictively[1016] and concurs with deGuzman that the agreement with the host state could be an example for the use of a treaty as a source.[1017]

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1013 Klamberg, 2017.

1014 Heikkilä, 2017, pp. 242-252.

1015 "The phrase "in the second place" emphasises that the applicable treaties and the principles and rules of international law in the ICC legal system are legal sources that hierarchically are below the legal sources mentioned in Article 21(1)(a). This has also been stressed in case law. The ICC has held that the external sources of law can only be resorted to when two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements and the RPE; and (ii) the lacuna cannot be filled by the application of the criteria of interpretation provided in the Vienna Convention and Article 21(3) of the ICC Statute (Prosecutor v. Al Bashir, ICC PT. Ch. I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, § 44. See also for example, Prosecutor v. Ruto et al., ICC PT. Ch. I, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the ICC Statute, 23 January 2012, § 289). In this regard, the ICC has in relation to modes of responsibility found that since the Statute in detail regulates the applicable modes of responsibility, it is not necessary to consider whether CIL admits or discards some modes of responsibility (Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, § 508)."
Heikkilä, 2017, p. 245.

1016 "Importantly, the fact that a question is not regulated in ICC's internal legal instruments does not necessarily mean that there is a lacuna that must be filled by applying external legal sources (See further for example, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, AC, 13 July 2006, §. 33–39). Article 21(1)(b) contains the criterion of "where appropriate", which emphasises that the judges have a certain discretion in the use of the external legal sources."
Heikkilä, 2017, p. 245.

1017 "It appears that applicable treaties at least include those to which the Court itself is a party, viz. the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004) and the Headquarters Agreement between the International Criminal Court and the Host State (2007)."
Heikkilä, 2017, p. 245.

The French commentary edited by Fernandez, Pacreau and Ubéda-Saillard,[1018] where Article 21 is commented by Nathalie Clarenc Bicudo[1019], points out that the aim was " de limiter le pouvoir discrétionnaire des juges dans la détermination du droit applicable" and "[l]e Statut a été conçu comme une source exhaustive du droit applicable par la Cour".[1020] She puts that it is not a hierarchy but a strict order of application that is conceived, a priority of application where the norms in the first sub-point are followed by the norms in the second sub-point.[1021] (The French text gives support to this argumentation.) On this basis, she criticizes the Katanga condemnation judgment[1022] for a wording where *priority* appeared *quasi* as *primacy* as far as the judges considered the invocation of applicable treaties possible and that of the principles and rules of international law *'only in case of lacuna'*.[1023] Nevertheless, she expresses her trust that actual conflict could only rarely emerge.[1024]

In this way, her conclusions follow those of Alain Pellet, who also criticized the adopted formula. "Yet, the combination of this formal hierarchy with another, substantial hierarchy is perplexing. In any case, the latter seems mainly aimed at giving a clear conscience to the authors of the Statute and should have little concrete impact on the implementation of the applicable law."[1025]

The crucial point is the interpretation of the *'only in case of lacuna'* formula. While it has its legitimacy in the observation of *material criminal law* rules and the *procedural criminal law* rules of the Rome Statute hence serving the principles of *nullum crimen sine lege* and *fair trial* on the one hand and showing due respect to the difficult compromise achieved at the Rome Diplomatic Conference on the other, its over-extended application could run against the 'interests of justice'

1018 Fernandez et al, 2019.
1019 Clarenc Bicudo, 2019, pp. 957-976, et en particulier pp. 959-960.
1020 Clarenc Bicudo, 2019, pp. 960, 961.
1021 Clarenc Bicudo, 2019, pp. 968-969.
1022 Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG ('*Katanga* Judgment') §§ 40-41 (Accessed: December 1, 2023)
1023 Clarenc Bicudo, 2019, p. 969.
1024 Clarenc Bicudo, 2019, p. 969.
1025 Pellet, 2002b, p. 1082.

and it can hamper judges in the perception of complex international legal situations inseparably underlying a 'case' or a 'situation'.

In such cases, in my view, judges must not end their analysis at article 21(1)(a) of the Statute simply because it begins with 'in the first place'. Rather, they have the obligation to refer to article 21(1)(b) of the Statute ('in the second place, where appropriate') and also to article 21(1)(c) of the Statute ('failing that') when the circumstances require.

It follows that according to jurisprudence and legal doctrine, ICC judges can base their findings solely on article 21(1)(a) of the Statute only when the issue under scrutiny is so simple that the answer can evidently be found in the provisions of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence (the 'Rules').

However, when the submitted request repeatedly emphasizes the complexity of the issues,[1026] we can hardly speak of simplicity.

In order to have a better understanding of the original message of the often-evoked Appeals Chamber judgements[1027] for the use of the *'only in case of lacuna'* formula, it is necessary to study their context.

The first decision[1028] treated the Prosecutor's request which in the attempt to obtain an interlocutory appeal, also cited some common

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1026 See e.g. "[h]owever, mindful of the unique and complex factual and legal circumstances in this situation, and the significance of the requested ruling on the Court's exercise of jurisdiction, the Prosecution requests an extension of pages to a maximum of 110 pages.'(...)'the Request addresses an issue which is not only highly significant to any exercise of jurisdiction over this situation by the Court, but touches upon matters which are perhaps uniquely controversial within the international community. As such, it is legally and factually complex."
Situation in Palestine, Application for extension of pages for request under article 19(3) of the Statute, 20 December 2019, ICC-01/18-8 ('Application for extension of pages'), § 2., 5. ;
See also 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 22 January 2020, ICC-01/18-12, together with Public Annex A, ICC-01/18-12-AnxA, at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF , §. 5, 46-52, 65, 80, 116 etc.

1027 See also Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 17 May 2019, ICC-02/05-01/09-397-Corr, § 97.

1028 Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, § 33-39).

law rules as general principles of law. This led the Appeals Chamber into a detailed examination in order to establish that article 82 of the Statute exhaustively regulates the issue. The Appeals Chamber also considered the preparatory works dedicated to this article as well as the wording of some international human rights conventions.

The second decision[1029] concerns a case where the defence requested a stay of proceedings on the basis of an alleged irregularity in the cooperation between the Prosecutor and the government of the Democratic Republic of Congo. In support of its argument, the defence referred to the practice developed in several common law countries under the name of 'doctrine of abuse of process'. Of note, this concept only received limited acceptance in civil law countries.[1030] In fact, the question was whether to accept what was presented by a party as a 'general principle of law'.

In my view, the lesson learned from these two judgments is that an extensive analysis is in fact required before accepting a *prima facie* rule as a general principle of law.

It is true that in the first ten years of the ICC jurisprudence, several decisions adopted the 'only in case of lacuna' approach (such as in the *Al Bashir* case[1031] or in the Kenyan situation).[1032] This is also reflected

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1029 See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, § 34.

1030 *See* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo* 14 December 2006, ICC-01/04-01/06-772, § 33.

1031 The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 3 April 2009, ICC-02/05-01/09-3, § 44.
"Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute."

1032 Pre-Trial Chamber II, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of

in the great commentaries. It is worth mentioning that for some commentators, the issue is whether the 'lacuna' can be *adequately* filled through the interpretation of the Rome Statute according to the Vienna Convention on the Law of Treaties[1033] and by taking into account the Elements of Crimes and the Rules.

These commentators nevertheless emphasise that in practice "[t]he Court is free to refer to all treaties in its search for the principles and rules of international law referenced in paragraph 1(b). While treaties that are merely 'relevant' to the work of the Court cannot be applied directly, therefore, they can nonetheless provide evidence in support of the other sources. This makes sense because [...] it is unlikely that the drafters wished to deprive the Court of the possibility of referring to international treaties to assist them in deciding novel issues."[1034]

Obviously, there is a great difference between *i.* claiming an additional, typically procedural right not recognized by the Rome Statute or the Rules simply by referring to its presence in another international treaty (or in the interpretation of such a treaty in the jurisprudence) and *ii.* referring to the provisions of the United Nations Charter and the practice of the UNO when interpreting the content of a certain document relevant to an actual situation or case submitted before the ICC.

While the former is a claim for 'importation', the latter is a question of interpretation. The 'only in case of lacuna' approach seems to pertain to the first category (the claim for importation). Of note, the question of whether there is a lacuna or not may also not necessarily

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Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, § 289.
"The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law. But even then, applying a customary rule of international law only "where appropriate" limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a). In other words, the Chamber should not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a)."

1033 deGuzman, 2022, § 11, 20, 21.

1034 deGuzman, 2022, p. 1138., (citing: L. Sadat, 2021, § 12).

be easy to answer at once (as it has been the case, for example, with the issue of 'no case to answer' before several chambers of the Court).

That is why, in my view, when implementing the latter (the tool of interpretation of a document), the restrictions reflected in the above cited decisions do not prevent consideration of the rules of public international law.

Moreover, the already mentioned Katanga judgment superseded the two old dicta sometimes cited for substantiating the 'only in case of lacuna' concept. Here, Trial Chamber II gave a rather lengthy presentation of the rules of interpretation contained in articles 31 and 32 of the Vienna Convention, and then clarified when a chamber 'may' and when it 'must' rely on extraneous rules.[1035] The chamber did not reiterate the alleged 'prohibition' to have recourse to extraneous rules. On the contrary, according to its interpretation, it is an obligation ('the Chamber must') 'where the founding texts do not specifically resolve a particular issue', and there is always a possibility ('the Chamber may') to benefit from extraneous international legal rules 'where it is established that they are applicable to the relations between the States Parties'.[1036] It is clear from the examples it gives that the chamber understood article 21(1)(b) and (c), and article 21(3) of the Statute

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1035 Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG ('*Katanga* Judgment'), § 47.
"Article 31 of the Vienna Convention also provides that in addition to the context consideration shall be given to "any relevant rules of international law applicable in the relations between the parties". The General Rule provides that, to interpret or impart meaning to a provision of a treaty, *the bench may rely on rules extraneous to the text concerned (in this case, the founding texts)* where it is established that they are applicable to the relations between the States Parties. *Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law.* To this end, the Chamber may, for example, be required to refer to the jurisprudence of the *ad hoc* tribunals and other courts on the matter. Nonetheless, the ultimate meaning which the Chamber will apply must always be underpinned by the above-mentioned method of interpretation, which means that it must construe, in good faith, the terms used in accordance with their ordinary meaning, considered in their context and in the light of the purpose and object of the Statute." (emphasis added)

1036 *Katanga* Judgment, § 47.

as needing to be interpreted in conjunction with article 31(3)(c) of the Vienna Convention.

In the judgment of the appeal submitted by Jordan in a later phase of the Al Bashir case, the Appeals Chamber did not mention the 'only *in case of lacuna*' formula and although it stated that it argued "in keeping with article 21(1) (a) of the Statute" [1037], a special sub-chapter was devoted to the presentation of the conformity of the text of article 27(2) to customary law.[1038] In the joint concurring opinion of three judges, the analysis of the customary law basis of the statutory disposition about the non-applicability of eventual constitutional immunity comes back again in a sub-chapter.[1039]

Consequently, as to the recourse to international law, the extended form of the *'only in case of lacuna'* approach is rather an arbitrary interpretation made in some academic and scholarly works. Yet, as to alleged restrictions regarding tools of interpretation it has never been an authoritative position established in the Court's jurisprudence.

The interpretation of the formula *'in the second place, where appropriate'* and the issue of the validity or limits of the *'only in case of lacuna'* approach are not purely hypothetical discussion matters. Their importance could be felt in the majority decision[1040] and the at-

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1037 "(...) For present purposes, the issues in the appeal are adequately resolved along the same general framework of reasoning that the Pre-Trial Chamber had adopted in this case, with the exception of a strain of reasoning concerning customary international law. Following that approach, in keeping with article 21(1) (a) of the Statute, which stipulates that the Court shall apply '[i]n the first place, [the] Statute', the Appeals Chamber is satisfied that the issues in this appeal ultimately rest on a proper construction of the provisions of the Rome Statute, in particular articles 27(2), 86, 89 and 98 of the Statute.(..)" International Criminal Court, 2019e, pp. 51-52, § 97.

1038 Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, pp. 100-119 and in particular § 98, 101, 103, 113, 114, 115, 116, 117, 118, 119.

1039 Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, ICC-02/05-01/09-397-Anx1 06-05-2019, at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF, pp. 171-189, § 413-451.

1040 International Criminal Court, 2021p.

tached dissenting opinion[1041] concerning the Palestinian situation and their coverage in political and academic discussions and follow-ups.

The enumeration of the 'sources' in article 21 of the Rome Statute and their real internal relationship as reflected in the practice of the International Criminal Court is definitely interesting and deserves regular appraisal.

## 2. THE PECULIAR POSITION OF THE 'PRELIMINARY RULING' IN THE ROME STATUTE AND IN THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURT

It is well known that some international courts have an advisory capacity beside their dispute settling jurisdictional competence (see e.g. the late Permanent Court of International Justice and the current International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights[1042], the African Court on Human and Peoples' Rights[1043] or during its short existence in the nineties the Arbitration Commission of the Peace Conference on Yugoslavia, i.e. the so called Badinter Commission, etc.). Some of them (e.g. the Badinter Commission) used exclusively this advisory competence while others (PCIJ, IACtHR, ACtHPR) gave nearly equal footing to the advisory competence and to the decisions passed in contentious cases. In case of the European Court of Human Rights, this capacity has been neglected for fourty years, however the reform mandating supreme courts to ask for advisory opinion seems to give new impetus.[1044]

As to the European Court of Justice, it is a *communis opinio doctorum* that the delivered 'preliminary rulings' represent a more important contribution to the uniform application of European law than the pronounced judgments in different litigations.

Some international tribunals do not have advisory competence (Permanent Court of Arbitration and the *'sleeping beauty'* Court of

1041 Kovács, 2021.
1042 Buergenthal, 1985, pp. 1-27.; Benz, 2019.
1043 Van Der Mei, 2005, pp. 27-46.
1044 Jahn, 2014, pp. 821-846.

Conciliation and Arbitration of the OSCE). However, professor Decaux, president of the latter court has recently suggested that it should be revitalized through granting advisory competences.[1045]

International criminal tribunals in general are not vested with this capacity, which has often been explained by the special nature of international criminal law and the hierarchical structure of trial chambers and appeal chamber.

How does it work in case of the ICC?

Even if the Rome Statute does not contain any reference to such competence as to give an advisory opinion, it does have a disposition about issuing a preliminary ruling. As Article 19(3) stipulates *"The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court."* The same text in French is as follows: *"Le Procureur peut demander à la Cour de se prononcer sur une question de compétence ou de recevabilité. Dans les procédures portant sur la compétence ou la recevabilité, ceux qui ont déféré une situation en application de l'article 13, ainsi que les victimes, peuvent également soumettre des observations à la Cour."*

Contrary to the nature of an *'opinion'*, a *'ruling'* is a binding decision in common law and the commentaries of the Rome Statute follow the same direction when they highlight the judicial economy of settling important legal questions in advance (see Nsereko and Ventura[1046] or

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1045 "Can we go further without stepping out of our role as "honest intermediary"? One can imagine regular contacts with other OSCE bodies such as the Parliamentary Assembly or the Office for Democratic Institutions and Human Rights. We are constrained by the legal framework of the Convention, but the Court could take on extra-conventional functions, in the advisory field, for example, as has sometimes been suggested. In this sense, the success of the Venice Commission for Democracy through Law, an open agreement of the Council of Europe, is quite remarkable and synergies could be found."
Speech of President Decaux at the Seminar "Conflict Resolution within the OSCE", in: Court of Conciliation and Arbitration, Annual Report 2022, ailable at: https://www.osce.org/files/f/documents/e/8/539894.pdf , p. 19.

1046 "(...) the Prosecutor could seek a determination as to whether the Court has *jurisdiction* over crimes committed within a situation or in certain clear-cut instances that investigations and prosecutions were *admissible* in a

Abdou[1047]) Even if the French text contains a verb (*'se prononcer'*), which could grant some elasticity in the interpretation, the French commentary (Trigeaud[1048]) reflects the same approach as the English one.

The real issue is not the choice between a mandatory or an advisory nature, but the problematic statutory position of Article 19 (3,) placed in an Article, the title of which is: *Challenges to the jurisdiction of the Court or the admissibility of a case.*

Consequently, what the logical interpretation *prima facie* suggests is that the preliminary ruling should be limited to a post-challenge hypothesis. Such a deduction could confront, however, the message of Article 19 (1) stipulating that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its

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situation where for example, the State's judicial system was clearly unable or unwilling to genuinely investigate or prosecute. This approach saves the Prosecutor's (and the Court's) finite resources by ensuring that time, money and work power is not invested in a matter when jurisdiction or admissibility is in doubt, promotes certainty in the Prosecutor's work, would facilitate cooperation from States and prevents such issues from being relitigated case by case."
Nsereko, Ventura, 2022, p. 1062.

1047 "Article 19(3) provides the Prosecutor with a procedural mechanism for seeking guidance from the Court on a question of jurisdiction or admissibility at an early stage of the proceedings, before any determination by Court and prior to the lodging of a challenge by a person or a State. Such mechanism is intended to assist the Prosecutor in properly discharging its investigative and prosecutorial functions by requesting a preliminary ruling from the Pre-Trial Chamber."
Abdou, Mohamed: Article 19, in Clicc Commentary, available at: https://cilrap-lexsitus.org/clicc/clicc/19-3/19-3

1048 "Le Procureur, à son tour, est autorisé à intervenir dans cette procédure, quoiqu'il ne s'agisse pas qu'il présente à la Cour des griefs sous la forme de conclusions et de moyens, seulement peut-il admettre une „question" appellant celle-ci à dissiper un doute ou à résoudre un point qu'il ne pourrait – ou ne voudrait – trancher seul, sans l'appui de la juridiction. (...) Cette démarche se révélerait fort util dans des situations complexes (...) ou lorsque la compétence de la Cour est véritablement sujette à caution. (...) La procédure de l'article 19(3) n'est pas pour autant une procédure abstraite d'avis consultatif, grâce à laquelle le Procureur vérifierait systématiquement la compétence de la Cour ou la recevabilité des requêtes. La demande doit tout de même être emprunte d'une certaine gravité. (...)"
Trigeaud, 2019, p. 930.

own motion, determine the admissibility of a case in accordance with article 17." It goes without saying that there is no presumption of jurisdiction *in abstracto,* and Article 15 (*'Prosecutor'*) as well as Article 17 (*'Issues of admissibility'*] enumerate in detail the relevant principles to follow in the matter. This means, that obviously, nothing would support the interpretation that the applicability of Article 19 (1) should be limited to the hypothesis where there is a challenge or a contestation. On the contrary, the chambers should check *proprio motu* whether they are competent or not.

Studying Article 18 (*'Preliminary rulings regarding admissibility'*), the reader can even be more perplex. Despite its title, this article does not really deal with preliminary rulings. Beside the title, the word 'rulings' is mentioned three times (in paragraph 4[1049], paragraph 6[1050] and paragraph 7[1051]), however neither of these is of 'preliminary ruling' nature.

*Primo,* as we may see, the adjective 'preliminary' is missing in these paragraphs. *Secundo,* the different paragraphs of Article 18 deal with *i.* the notification to the States about the opening of an investigation (paragraph 1); *ii.* the States' reactions and their follow-up; *iii.* rulings ordered by a Pre-trial Chamber about authorization of an investigation (paragraph 2) or of 'necessary investigative steps' in case of a 'unique opportunity' (paragraph 6); *iv.* the State's right to challenge these rulings as well as the admissibility (paragraph 7).

This strange situation, where in Article 18 there is no genuine 'preliminary ruling' in spite of the title and where in Article 19, paragraph 1 has an autonomous 'challenge-free' existence irrespective of the

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1049 "The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis."

1050 "Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available."

1051 "A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances."

title, made some commentators suggest that paragraph 3 recognizes the Prosecutor's competence to ask for a preliminary ruling also in case no challenge has been submitted.

This interpretation, to my knowledge, was first published by former ICC judge Nsereko in the commentary written together with Hall and Ventura in the 3rd edition (2016) of the Triffterer commentary: "In contrast to Paragraph 3 to 'seek a ruling regarding a question of jurisdiction or admissibility' is not limited to a 'case'. Therefore, in certain circumstances, the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible, although this view is not universally accepted."[1052] They added in a footnote that "Ideally, such a position should have been provided for in Article 18."[1053]

As it is well known, the OTP has used Article 19(3) so far in the Myanmar situation and in the Palestinian situation.

The request Mrs Fatou Bensouda submitted got a certain doctrinal support e.g. on behalf of Alex Whiting, who developed arguments both in favour and against.[1054]

On both occasions, the PTC I was divided about the applicability of article 19(3) in another context than that of a formal challenge.

Concerning the Myanmar decision[1055], given the problem of the restrictive character of the title of Article 19 and its 'impact' on the interpretation of its paragraph 3, the judges were not ready to follow directly Mrs Bensouda's perception, coinciding by the way with the Nsereko's approach.

In a majority decision[1056], the Pre-Trial Chamber avoided adopting or rejecting the suggested interpretation and it emphasized that its

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1052 Hall, Nsereko, Ventura, 2016, p. 875.

1053 *Ibid.*

1054 Whiting, Alex : Process as well as Substance is Important in ICC's Rohingya Decision at https://www.justsecurity.org/56288/process-substance-important-iccs-rohingya-decision/ , pp. 1-2.

1055 International Criminal Court, 2018b. (In the followings: Myanmar decision, 2018)

1056 Judges Reine Alapini Gansou and Péter Kovács.

powers can also be based on article 119 (about 'Settlement of disputes') and the *Kompetenz-Kompetenz* rule.

"It follows that the Chamber is empowered to rule on the question of jurisdiction set out in the Request in accordance with article 119(1) of the Statute. Consequently, the Chamber does not see the need to enter a definite ruling on whether article 19(3) of the Statute is applicable at this stage of the proceedings."[1057] Moreover "the Chamber considers that it also has the power pursuant to the principle of *la compétence de la compétence* to entertain the Prosecutor's Request. The Chamber does not consider it necessary to pronounce itself on the limits or conditions of the exercise of its *compétence de la compétence* for the purposes of the Request *sub judice*. Suffice it to note that, as highlighted by the Prosecutor herself, the jurisdictional question raised in the Request is not an abstract or hypothetical one, but it is a concrete question that has arisen in the context of individual communications received by the Prosecutor under article 15 of the Statute as well as public allegations of deportation of members of the Rohingya people from Myanmar to Bangladesh."[1058]

On the other hand, the dissenting judge argued that neither Article 19(3), nor Article 119 or *Kompetenz-Kompetenz* are applicable in the issue *sub judice* as far as there is no actual 'case' and there is no formal challenge submitted in the 'case'.[1059]

The most important issue of the Myanmar decision was however whether the ICC enjoys jurisdiction over the crime of deportation having allegedly occurred mostly on the territory of Myanmar, a non-State Party but partly also on the territory of a State-Party due to the Rohingyas' arrival in Bangladesh after crossing the two states' border. As it is well-known, the Pre-Trial Chamber gave an affirmative answer and it approved the Prosecutor's theory stating that 'one single State-Party related territorial element suffices for the jurisdiction over the given crime as a whole'. A few months later, another

1057 Myanmar decision, 2018 § 28, pp. 11-12.

1058 Myanmar decision, 2018, § 33, p. 15.

1059 Partially dissenting opinion of judge Marc Perrin de Brichambaut, ICC-RoC46(3)-01/18-37-Anx 06-09-2018, available at: https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_04205.PDF

Pre-Trial Chamber was constituted which granted the authorization for investigation.[1060]

The doctrinal echo of the preliminary ruling and of the decision on authorization was rather positive[1061], however, e.g. Dov Jacobs[1062] fully shared the dissenter's position. Vagias, while apparently sympathizing with the dissent as to the problems around the procedural basis for granting the preliminary ruling, was rather satisfied with the decision on the merits.[1063] Bitti summarized the arguments developed by the majority and the dissent.[1064]

Nsereko and Ventura regretted the missed occasion to approve the extensive interpretation of Article 19 (3) jurisprudentially and they expressed their hope that the already submitted request for preliminary ruling in the Palestine Situation will produce a more satisfactory and a more straightforward result.[1065]

In her request for a preliminary ruling, Mrs Bensouda referred once again to the permissive interpretation of Article 19(3). This time, the Pre-Trial Chamber (composed of the same judges) was ready to render a decision even if only two judges accepted the suggested interpretation of Article 19(3)[1066]. With the Myanmar decision in mind, they emphasized that there "the Chamber did not reject the possibility of applying article 19(3) of the Statute with regard to the 9 April 2018 Request."[1067] They added that the legal circumstances are however different[1068] and they stated that "[i]n these circumstances, the

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1060 International Criminal Court, 2019f.

1061 See: a short summary of the scholarly articles in: Kovács, 2021b, pp. 223-230.

1062 Jacobs, Dov: ICC PTC issues advisory opinion (yes, yes) on ICC jurisdiction over Rohingya deportation, available at https://dovjacobs.com/2018/09/06/icc-ptc-issues-advisory-opinion-yes-yes-on-icc-jurisdiction-over-rohingya-deportation/

1063 Vagias, 2019, pp. 368-375.

1064 Bitti, 2019, pp. 948-949.

1065 Nsereko, Ventura, 2022, p. 1063.

1066 International Criminal Court, 2021p. (In the followings: Palestine decision, 2021).

1067 Palestine decision, 2021, § 63, p. 30.

1068 "Accordingly, the principal difference is that the Chamber had to rule on the 9 April 2018 Request in the context of the initial stages of a preliminary examination, while the present request arises out of an investigation that has,

Chamber considers it appropriate to determine whether article 19(3) of the Statute is applicable. Specifically, the Chamber must determine whether, in relation to an investigation that has, in principle, already been initiated by the Prosecutor, a ruling on a question of jurisdiction may be sought and issued on the basis of article 19(3) of the Statute either in the situation or once a case arises from that situation. (...) The Chamber considers that a ruling on a question of jurisdiction pursuant to article 19(3) of the Statute may be sought and issued before a case emanates from a situation."[1069]

In its argumentation, the decision put emphasis on the fact "that several other paragraphs of article 19 of the Statute also contain references to 'case'. However, paragraphs 4 to 11 of this provision merely specify other aspects of this provision. Therefore, the references to 'case' in these paragraphs do not detract from the conclusion that article 19 of the Statute sets forth three mechanisms regulating different situations."[1070]

The judges took account of the similarity of Article 19(1) and Article 19(3), and pointed out that the 'incapsulating' of different rules under a surprisingly common title appears in the Rome Statute elsewhere as well.[1071]

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in principle, already been initiated. In addition, the Prosecutor has identified potential cases in the present Situation for the purposes of determining whether such cases are or would be admissible." Palestine decision, 2021, § 66, p. 31.

1069 Palestine decision, 2021, §§ 67-68, pp. 30-31.

1070 Palestine decision, 2021, § 74, p. 33. (*Footnotes omitted.*)

1071 "Similarly, the reference to '[c]hallenges' in the heading of article 19 of the Statute does not restrict its entire scope of application but merely denotes the main purpose of this provision. The obligation of a chamber to satisfy itself that it has jurisdiction arising from article 19(1) of the Statute omits a reference to 'challenge' and, thus, also applies in the absence of a challenge. This is comparable to the mechanism contained in article 19(3) of the Statute. It, namely, acknowledges that the Prosecutor's mandate regarding the initiation of investigations and prosecutions may give rise to the need to resolve a question of jurisdiction or admissibility at an early stage of the proceedings by way of a ruling by the Pre-Trial Chamber without a challenge to the Court's jurisdiction having been lodged. Moreover, it is well-known that various other headings in the Statute also do not entirely encapsulate the contents of the articles they pertain to, which lends further support to the

They added that the *'travaux préparatoires'* do not deny the interpretation submitted by the Prosecutor.[1072]

Let's see just two obvious examples for the surprising titles related e.g. with reparation matters: Article 75 (Reparations to victims) is placed in Part 6 (The Trial) and Article 79 (Trust Fund) has its place in Part 7 (Penalties).

Judge Brichambaut appended however a separate opinion to the introductory part of the decision explaining why the Prosecutor's interpretation of Article 19(3) could be accepted.[1073] I appended a rather lengthy dissenting opinion concerning the answer given *in merito* concerning the territorial scope of the investigation.[1074]

The echo of the Palestine decision as well as of the dissenting opinion was enormous.[1075] The reactions concerned however mostly the definition and the argumentation of the territorial scope of the jurisdiction (see *inter alia* Bitti[1076]), but Kai Ambos[1077] covered the issue of the interpretation of Article 19(3) as well.

The real problem of the applicability of the preliminary ruling in Article 19(3) in a context not falling under the 'challenge context' has not yet been solved even if until the writing of this article in January 2024, Mr Karim Khan, the new Prosecutor, had not submitted any requests for preliminary ruling. As we see, neither of Mrs Bensouda's two requests received a unanimous acceptance or a *unisono* argumentation on behalf of the judges.

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finding that the heading of article 19 of the Statute is not determinative of its scope of application."
Palestine decision 2021, § 75, pp. 33-34.

1072 Palestine decision 2021, § 76, pp. 34-35.

1073 Partly separate opinion of judge Perrin de Brichambaut, ICC-01/18-143-Anx2 05-02-2021, at https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01166.PDF

1074 Kovács, 2021.

1075 The first two dozen are well summarized in: Sweers, 2021, pp. 290-304.

1076 Bitti, 2022, pp. 925-927.

1077 "A narrow approach would counter precisely this highly important practical purpose of Article 19(3).
There are good reasons to follow this broad interpretation of Article 19(3), particularly reasons of judicial efficiency and expediency (...)."
Ambos, 2021.

As neither of the decision were appealed, the position of the Appeals Chamber has not yet been expressed.

As far as I am concerned, I hope that the Appeals Chamber judges will be inclined to recognize the possibility for the Prosecutor to request preliminary rulings also in the hypothesis where no challenge has been formally submitted. If the peers consider it useful to limit this prerogative, they can certainly formulate correct, well-reasoned conditions.

This could only be a provisory solution. The best solution, in my view, is a simple *toilettage* of Article 18 and Article 19 moving the current text of Article 19(3) into Article 18 as its paragraph 8 (and eventually amending the title[1078]) while Article 19(3) remains empty. Some other possibilities are also imaginable e.g. *i.* to create a new Article 18*bis* or *ii.* to leave Article 19(3) as it stands but to add an Article 18(8) with the same text as in Article 19(3), etc. All in all, the thought hidden by Hall, Nsereko and Ventura in the precited footnote is worth being materialized. In other words: the diagnosis they established deserves a proper treatment.

During my campaign before my election to the ICC, I got the advice to speak about everything but the modification of the Rome Statute, because States Parties are afraid to open Pandora's box and they reject all initiatives coming from whatever government, irrespective of its theoretical usefulness. I followed this advice, and I chose to speak about jurisprudential ways of rendering the work of the ICC more efficacious.

Taking into account that my mandate will be about to come to an end and at the Twenty-second session of the Assembly of States Parties, a small textual reform had also been adopted[1079], I think that I might dare to write that it would be useful to start thinking about this

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1078 i.e. to add "and jurisdiction" for becoming 'Preliminary rulings regarding admissibility and jurisdiction'.

1079 Resolution ICC-ASP/22/Res.2, Adopted at the 9th plenary meeting, on 13 December 2023, by consensus ICC-ASP/22/Res.2, Amendment to article 39 of the Rome Statute:
"The Assembly of States Parties, (...) 1. Decides to adopt the following amendment to article 39(2)(b) of the Rome Statute of the International Criminal Court. Insert in Article 39(2)(b) the following chapeau: Article 39 Chambers 2 (b) "Without prejudice to the replacement of a judge, as provided for in the Rules of Procedure and Evidence" ".

minor *toilettage* of the Rome Statute: to change the position of current Article 19(3) would not impose any additional burden on States, it would not alter the internal repartition of competences between the different institutions; it could contribute to judicial economy and put an end to disputes about its applicability.

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